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UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States for the Southern District of New York, DO HEREBY CERTIFY that the following Volumes I, II, III, IV, V, VI, VII, the pages of which are numbered in Volume I from 1 to 645; in Volume II from 1 to 1217; in Volume III from 1 to 605; in Volume IV from 1 to 877; in Volume V (Case on Appeal of Amherst College *vs.* Ritch) from 1 to 1117; in Volume VI (In the matter of the Probate, etc., of Daniel B. Fayerweather) from 1 to 916; in Volume VII (Appendix of Exhibits) 1 to 600, inclusive, contain a true and complete copy and transcript of the Record, Assignments of Error, and all proceedings had in said Court, in the cause entitled EMMA S. FAYERWEATHER and MARY W. ACHTER, Complainants-Appellants, against THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually and as Trustees and Executors of the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the codicils thereto, The Trustees of Amherst College, The Trustees of Dartmouth College, The Trustees of Hamilton College, The University of Rochester, The President and Trustees of Williams College, The President and Trustees of Bowdoin College, The Union Theological Seminary in the City of New York, Cornell University, The Adelbert College of the Western Reserve University, The Northwestern University, The Woman's Hospital in the State of New York, The Mount Sinai Hospital, The Presbyterian Hospital in the City of New York, The Manhattan Eye and Ear Hospital, St. Luke's Hospital in the City of New York, Wesleyan Univerity at Middletown, Conn., Lafayette College at Easton, Pa., Marietta College, The President and Fellows of Yale College in New Haven, Conn., The Trustees of Columbia College in the City of New York, and John B. Reynolds, as Sole Executor of the Last Will and of the Codicil thereto, of Lucy Fayerweather, Defendants-Appellees, and JOHN B. REYNOLDS, as Sole Executor of the Last Will and Testa-

ment, and the Codicil thereto of Lucy Fayerweather, deceased, Cross-Complainant-Appellant, against THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually and as Trustees and Executors of the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the codicils thereto, The Trustees of Amherst College, The Trustees of Dartmouth College, The Trustees of Hamilton College, The University of Rochester, The President and Trustees of Williams College, The President and Trustees of Bowdoin College, The Union Theological Seminary in the City of New York, Cornell University, The Adelbert College of the Western Reserve University, The North Western University, The Woman's Hospital in the State of New York, The Mount Sinai Hospital, The Presbyterian Hospital in the City of New York, The Manhattan Eye and Ear Hospital, St. Luke's Hospital in the City of New York, Wesleyan University at Middletown, Conn., Lafayette College at Easton, Pa., Marietta College, The President and Fellows of Yale College in New Haven, Conn., The Trustees of Columbia College in the City of New York, Emma S. Fayerweather and Mary W. Achter, Defendants-Appellees, as the same remain of record and on file in my office.

AND I IDENTIFY said Volume V, being The Case on Appeal in the Court of Appeals of the State of New York entitled "The Trustees of Amherst College, *et al. vs.* Ritch *et als.*", from page 1 to 1117 inclusive; said Volume VI being the record in the Surrogate's Court, upon probate of the Will of Daniel B. Fayerweather, deceased, from page 1 to 916 inclusive; said Volume VII being the Book of Briefs from page 1 to 600 inclusive, sent herewith by me, as copies of the Books and Records referred to in the Order of July 18th, 1901, of Hon. E. Henry Lacombe, United States Circuit Judge, (See Vol. IV, page 639), as to which Volumes V, VI and VII said order provided that the same need not be printed at length for return either to the Circuit Court of Appeals or to the Supreme Court of the United States, but that ONE copy might be used

upon final hearing and certified, attested or identified in lieu thereof.

IN TESTIMONY THEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York in the Second Circuit, [SEAL.] this 16th day of December in the year of our Lord one thousand nine hundred and three, and of the Independence of the said United States the one hundred and twenty-eighth.

JOHN A. SHIELDS,
Clerk.

PLEAS BEFORE THE JUDGES OF THE

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT, IN THE SOUTHERN DISTRICT OF NEW YORK, AT THE FEDERAL BUILDING, IN THE BOUROUGH OF MANHATTAN, IN THE CITY, COUNTY AND STATE OF NEW YORK AT THE TERM IN THE YEAR 1901.

In Equity No. 6675 Bill of Complaint

EMMA S. FAYERWEATHER and MARY W. ACHTER 1

COMPLAINANTS,

against

THOMAS G. RITCH, JUSTUS L. BULKLEY, and HENRY B. VAUGHAN, individually and as Trustees and Executors of the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the Codicils thereto; the Trustees of Amherst College, the Trustees of Dartmouth College, the Trustees of Hamilton College, the University of Rochester, the President and Trustees of Williams College, the President and Trustees of Bowdoin College, 2
the Union Theological Seminary in the City of New York, Cornell University, Lincoln University, the Rector and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, the Adelbert College of the Western Reserve University, Park College, John B. Reynolds as sole Executor of the Last Will and Codicil of Lucy Fayerweather, deceased; Lucy J. Beardsley, Anner Amelia Reynolds, North Western University, the Mt. Sinai Hospital, the Presbyterian Hospital

in the City of New York, the Women's Hospital in the State of New York, the Manhattan Eye and Ear Hospital, the New York Eye and Ear Infirmary, the Manhattan Dispensary in the City of New York, the Montefiore Home for Chronic Invalids, the Methodist Episcopal Hospital in the City of Brooklyn, New York; St. Luke's Hospital in the City of New York, the New York Cancer Hospital, the Society of St. Vincent de Paul in the City of New York, the Trustees of Union College in the Town of Schenectady, in the State of New
3 York; Haveford College, at Haveford College Post Office, Montgomery County, Penn.; the University of the City of New York, the University of Pennsylvania, the Brown University of Providence, R. I.; the President and Fellows of Harvard University, Wesleyan University at Middletown, Conn.; Princeton College at New Brunswick, N. J.; Wells College at Aurora, N. Y.; Elmira Female College, Rutgers College, Vassar College, Poughkeepsie, N. Y.; Barnard College, the Peter Cooper Union for the Advancement of Science and Art, the Shattuck School at Faribault, Minnesota; Lafayette College at Easton, Pa.; Maryville College, Trinity College at
4 Hartford, Conn.; Wabash College, Marietta College, the President and Fellows of Yale College in New Haven, Conn., and the Trustees of Columbia College in the City of New York.

DEFENDANTS.

To the Judges of the Circuit Court of the United States for the Southern District of New York:

Emma S. Fayerweather and Mary W. Achter, of Muscatine, in the State of Iowa, citizens of that State, bring this, their bill of complaint, against the following named defendants, all being citizens of different States from these complainants, and as respectively hereinafter set forth, being inhabitants of the Southern District of New

York, such defendants as are not inhabitants of said District being necessary parties to the enforcement of the legal and equitable lien upon and claim to and to remove an incumbrance, lien and cloud upon the title to the real and personal property within said District hereinafter set forth, that is to say:

Justus L. Bulkley, individually, and as Executor of the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the Codicils thereto, and as Trustee thereunder, a citizen of the State of New York, and an inhabitant of said District.

The Union Theological Seminary in the City of New York, a domestic corporation, organized under the
5 laws of the State of New York, and an inhabitant of said District.

The Mt. Sinai Hospital, the Presbyterian Hospital in the City of New York, the Woman's Hospital in the State of New York, the Manhattan Eye and Ear Hospital, the New York Eye and Ear Infirmary, the Manhattan Dispensary in the City of New York, the Montefiore Home for Chronic Invalids, St. Luke's Hospital in the City of New York, the New York Cancer Hospital, the Society of St. Vincent de Paul in the City of New York, the University of the City of New York, Vassar College, Poughkeepsie, N. Y.; Barnard College, the Peter Cooper Union for the Advancement of Science and Art, and the Trustees of Columbia College in the City of New
6 York, all of which are domestic corporations, organized under the laws of the State of New York, and inhabitants of said District.

Thomas G. Ritch, individually, and as Executor of the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the Codicils thereto, and as Trustee thereunder, a citizen of the State of Connecticut.

Henry B. Vaughn, individually, and as Executor of said Will and Codicils, and as Trustee thereunder, a citizen of the State of New Jersey.

The Trustees of Amherst College, a foreign corporation,

organized under the laws of the Commonwealth of Massachusetts.

The President and Trustees of Williams College, a foreign corporation, organized under the laws of said Commonwealth.

The President and Fellows of Harvard University, a foreign corporation, organized under the laws of said Commonwealth.

The Trustees of Dartmouth College, a foreign corporation organized under the laws of the State of New Hampshire.

The Brown University of Providence, R. I., a foreign corporation, organized under the laws of the State of Rhode Island.

Wesleyan University at Middletown, Conn., and the
7 President and Fellows of Yale College, in New Haven, Conn., and Trinity College, which are foreign corporations, organized under the laws of the State of Connecticut.

Princeton College at New Brunswick, N. J., and Rutgers College, which are foreign corporations, organized under the laws of the State of New Jersey.

Haveford College, Lincoln University, the University of Pennsylvania, and Lafayette College, which are foreign corporations, organized under the laws of the State of Pennsylvania.

8 The Adelbert College of the Western Reserve University, and Marietta College, which are foreign corporations, organized under the laws of the State of Ohio.

Wabash College, which is a foreign corporation, organized under the laws of the State of Indiana.

The North Western University, which is a foreign corporation, organized under the laws of the State of Illinois.

The Shattuck School at Faribault, which is a foreign corporation, organized under the laws of the State of Minnesota.

The Rector and Visitors of the University of Virginia,

and the Hampton Normal and Agricultural Institution, which are foreign corporations, organized under the laws of the State of Virginia.

Maryville College, which is a foreign corporation, organized under the laws of the State of Tennessee.

Park College, which is a foreign corporation, organized under the laws of the State of Missouri.

The Trustees of Hamilton College, the University of Rochester, the Methodist Episcopal Hospital in the City of Brooklyn, N. Y., the Trustees of Union College, Wells' College, the Elmira Female College and Cornell University, which are domestic corporations, organized under the laws of the State of New York.

Bowdoin College, a foreign corporation, organized under the laws of the State of Maine.

John B. Reynolds, as Executor of the Last Will and Testament of Lucy Fayerweather, deceased, and of the Codicil thereto; and Anner Amelia Reynolds, who are citizens of the State of Vermont.

Lucy J. Beardsley, a citizen of the State of Connecticut.

And thereupon your orators complain and say that:

Heretofore, to wit, on or about the 1st day of June, 1893, at the City of New York, in the District aforesaid, in the Supreme Court of the State of New York, the defendants, the Trustees of Amherst College, the Trustees of Dartmouth College, the Trustees of Hamilton College, the University of Rochester, and the President and Trustees of Williams College, as plaintiffs, brought a certain action, wherein all the other parties hereto and herein above named were defendants upon their certain complaint, a copy of which is hereto annexed, which complainants pray may be referred to and taken as part of this bill, as if the same were herein set out at length.

And thereupon such proceedings were had that these complainants duly served and filed their certain answer, a copy of which is hereto annexed, which complainants pray may be referred to and taken as part of this bill, as if the same were herein set forth at length.

And thereupon the issues so joined, as well as others duly raised by the answers of the several defendants, came on to be tried before said Court, and these complainants gave evidence tending to prove the allegations in their said answer and all of said allegations, and thereupon it became and was the duty of said Court to adjudge and determine whether the releases therein described were invalid, and whether these complainants were entitled to the affirmative relief prayed in respect thereto.

The issues aforesaid were material and necessary to be determined by said Court before any valid or lawful judgment in the premises could be given pursuant to due process of law, the law of the land and the provisions of the Constitution of the State of New York and of the United States.

There was then in the jurisdiction of said Supreme Court and within the said Southern District of New York, and there now is, real and personal property the residuary estate of Daniel B. Fayerweather, to the amount and of the value of upwards of three millions of dollars, which was the amount of his estate in excess of one-half thereof.

Said estate then and there by operation of law was and became upon the death of said Daniel B. Fayerweather, the property of these complainants, to the amount of two million of dollars and upwards, said complainants
12 then and there being the nieces and next of kin of said decedent.

Except as their said lien, claim and title had been divested by the said releases, complainants had an immediate right to the possession and enjoyment of said sum and said property, which was and remains in the actual possession and control of the defendants, Ritch, Barkley and Vaughan, then claiming to hold it and to have the legal title thereto, as executors of the last will and testament of said Daniel B. Fayerweather and of the codicils thereto, or as residuary legatees thereof, but in fact holding it in their own wrong and under color of a secret trust void by the statutes of the State of New York,

and using their wrongful possession and control thereof to coerce and compel these complainants in ignorance of their rights, in the premises, to release their rights thereto, upon an inadequate consideration paid to them by said defendants out of the very money so withheld and said releases were the same described in the said answer and were procured and executed and delivered by these complainants under the circumstances and misrepresentations and induced by the wrongful acts set forth in said answer.

Upon the trial of said action as aforesaid, the defendants herein, except John B. Reynolds, and Anner Amelia Reynolds, confederating and combining together and
13 between themselves to prevent the entry of any judgment upon an actual determination of the invalidity of said releases so in issue, requested and induced the Court to hold and decide that the right of the respective parties to said property and residuary estate did not require any consideration or decision of said issues and said Court thereupon made and rendered its decision without considering, passing upon or including in judgment the said issues and omitted to decide upon these complainants' right to the affirmative relief by said answer prayed in respect to said releases.

And thereupon there was filed and entered in said action a decision and judgment a copy of which is hereto annexed which complainants pray may be referred to
14 and taken as part of this bill as if the same were herein set forth at length.

Thereupon by appeals taken from said judgment, in which appeals these complainants were respondents as well as appellants, said judgment was reviewed by the General Term of said Supreme Court, sitting as a Court for the correction of errors, and not exercising any original jurisdiction, and thereupon said Court held and determined that the right of the respective parties to said property and residuary estate did require the consideration and decision of said issues, and thereupon, being duly informed by the record that said issues had not been, in fact, considered, passed upon or included in said judg-

ment, it became and was the duty of said Court pursuant to due process of law, the law of the land and the provisions of the Constitution of the State of New York and of the United States, to require and order that said issues should be in fact considered, passed upon and included in judgment by the trial Court, and until that should be done, said Court could not duly adjudge or determine whether any error had been committed in such determination, upon said issues.

Nevertheless said Court at said General Term did not so require or order, but by various fictions of law, imputed to said Trial Term and Court below that it had deter-
15 mined said issues and had decided in favor of the plaintiffs in said action upon such determination, contrary to the truth and fact, and thereupon pretended to adjudge and determine, as such Court for the correction of errors, that there was not sufficient preponderance of evidence to support the asserted invalidity of said releases, to render such imputed determination of said trial Court erroneous as matter of law, but that such imputed determination was supported by evidence sufficient to relieve the same from the assignment of errror in so deciding.

It was not competent for said General Term to have exercised an original jurisdiction and to have adjudged said issues and thereupon to have modified said judg-
16 ment so as to include the actual determination thereof; and said General Term did not exercise such power, but confined its action wholly to the consideration of errors in the record.

Thereupon said judgment was by appeals taken from the judgment of affirmance so rendered, in which appeals these complainants were respondents as well as appellants, reviewed by the Court of Appeals of the State of New York.

Said Court determined that these complainants had no standing to be heard or to have their rights determined by said Court of Appeals because the limitations imposed by statute upon the jurisdiction of said Court precluded

any inquiry into the facts, the proof or the merits of the said issues, but that said Court was bound by the formal record procured as aforesaid, and by the fictions thereby adjudged as aforesaid, and had no power to review the same.

During the pendency of the appeals aforesaid the control of the several Courts below over said action and the trial thereof and the correction of any injustice arising as aforesaid, was suspended and upon the affirmance of said judgment of affirmance, by the statutes of the State of New York, any correction of the injustice arising as aforesaid, was placed beyond the power of any Court of said
17 State, except as the Court of Appeals should by its remittitur confer power upon said subordinate Courts to entertain and try the said issues.

Thereupon these complainants duly made application to said Court of Appeals so to frame its said remittitur as to permit said subordinate Courts to entertain and try the said issues, which application said Court denied.

Complainants have exhausted their remedy in said Courts, and except as they may obtain relief in the premises herein they are remediless and will suffer irreparable injury.

By the determination of said Court of Appeals the judgment aforesaid was sustained, whereby the plaintiffs and those defendants in like case with them will re-
18 ceive and obtain the distribution and payment to them of said residuary estate, the property of these complainants, whereas by the settled rule of property established in said State by the prior decisions of said Court of Appeals ever since its creation, said residuary estate would not go to said plaintiffs.

Complainants are informed and believe that said decision of said Court of Appeals, in affirming said judgment so altering the settled rule of property, is not binding upon this Court, but that this Court is bound to follow the prior decisions of said Court so establishing such rule of property.

And now so it is, please your Honors, that the said

plaintiffs and said defendants, in like case with them, combining, confederating and conspiring together, and with said defendants herein, Ritch, Bulkley and Vaughan, to take the benefit of said fraudulent judgment obtained as aforesaid by fictions of law and false presumptions of facts known to all of them to be false, fictitious and fraudulent, and well knowing that these complainants had never had or obtained any trial or determination, pursuant to equity and the law of the land, respecting the validity of the said releases, and contriving, under color of the forms of law, to secure and obtain the payment to the said plaintiffs and defendants similarly
19 situated of said residuary estate, the property of these complainants, have made application to the Supreme Court of the State of New York to direct Ritch, Bulkley and Vaughan, as executors and trustees, and having in their possession and control within this district said residuary estate to the amount of three million dollars to pay and distribute the same forthwith to them.

And unless this Court shall interpose to restrain such action, and shall take possession and control of said residuary estate by the Receiver, the said estate is in danger of being paid over and distributed as aforesaid, and of being wasted and of passing out of the jurisdiction of this Court, whereby the fraudulent devices and lawless judgment aforesaid will be effectuated, and these com-
20 plainants deprived of the benefit of any decree that this Court may render.

Futher complaining, your orators further say:

That on or about the 15th day of November, 1890, Daniel B. Fayerweather departed this life at the city of New York, leaving a last will and testament, with five codicils thereto. The said last will and testament was executed on or before the 6th day of October, 1884, and a copy thereof is hereto annexed, marked "Exhibit A," and is made a part of this bill of complaint. The first of said codicils was executed by the testator on or about the 13th day of December, 1884, and a copy is hereto annexed,

marked "Exhibit B," and is made a part of this complaint. The second of said codicils was executed on or about the 7th day of January, 1888, and a copy is hereto annexed, marked "Exhibit C," and is made a part of this bill of complaint. The third of said codicils was executed on or about the 19th day of March, 1889, and a copy is hereto annexed, marked "Exhibit D," and is made a part of this bill of complaint. The fourth of said codicils was executed on the 11th day of November, 1890, but complainants, for the reasons hereinafter stated, are unable to annex a copy thereof. The fifth of said codicils was executed on the 15th day of November, 1890, and a
21 copy is hereto annexed, marked "Exhibit E," and is made a part of this bill. The said will, without the codicils, was duly admitted to probate by the Surrogate of the County of New York, on or about the 24th day of February, 1891, and the said codicils, Exhibits B, C, D and E were admitted to probate by the Surrogate of the County of New York, and a decree adjudging the said instruments to have been properly executed, and admitted the same to probate, and establishing the same, together with the last will and testament, as a will of real and personal property and directing that the same be recorded and that letters testamentary issue thereon to the executors therein named was entered in the office of the clerk of the said Surrogate on the 24th day of March, 1891,
22 and thereafter, on the 25th day of March, 1891, letters testamentary were issued by said Surrogate to the defendants, Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan as executors of the last will and testament of said Daniel B. Fayerweather, deceased, and the said defendants qualified as such executors and have taken possession of all the property and estate left by the said Daniel B. Fayerweather.

That the property and estate left by said Daniel B. Fayerweather at his decease, and which has come into the possession of the defendants, Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, under the said last will and testament and the codicils thereto is of the value of

upwards of $6,000,000, and that the residuary estate referred to in the tenth clause of the said last will and testament and in the first and fifth codicils thereto is of the value of upwards of $3,000,000.

That it was the intention and purpose of the said Daniel B. Fayerweather to devote the principal part of his estate upon his death to the several institutions of learning mentioned in the ninth paragraph of the said will and he attempted to accomplish the said purpose by the execution of the said will whereby, after making certain, definite, pecuniary legacies he gave to each of said institutions specific sums as legacies and gave all the rest,
23 residue and remainder of his estate to his executors therein named to have and to hold the same in trust to sell and convert the same into cash and to divide the same equally among the several corporations mentioned in the ninth paragraph of the said will, share and share alike. The said will was prepared by the defendant, Thomas G. Ritch, acting as legal adviser and attorney of the said Daniel B. Fayerweather. At the time of the execution thereof the said Daniel B. Fayerweather was advised by the said Thomas G. Ritch or those associated with him, that, under the statute of the State of New York, no person having a husband, wife, child or parent, could by a last will and testamsnt devise or bequeath to such institutions as were named in the ninth para-
24 graph of the said will, in trust or otherwise, more than one-half part of his estate, after the payment of his debts, and that such devise or bequest would not be valid to the extent of more than such one-half.

The said Daniel B. Fayerweather, acting upon the advice of and by the procurement of said Ritch at the same time he made and executed said will, executed and delivered to said Ritch a writing of which the following is a copy:

"NEW YORK, Oct. 6, 1884.

This certifies that I have executed my will of this date having been advised by my counsel of the provisions and

restrictions of the law of this State relative to benevolent corporations.

I trust my heirs will permit the provisions of this, my will, to be carried into effect.

D. B. FAYERWEATHER."

Thereafter, the said Thomas G. Ritch advised and procured the execution by said Daniel B. Fayerweather, of the first codicil (Exhibit B), to his will, whereby he revoked the tenth paragraph of his will and whereby all the residue of the estate of said Daniel B. Fayerweather,
25 remaining after the first nine paragraphs of his will had been complied with and carried into effect, was devised and bequeathed to the defendants, Thomas G. Ritch and Justus L. Bulkley. The said Daniel B. Fayerweather was induced to make and execute said codicil, as aforesaid, and to revoke the tenth paragraph of said will and to make the devise and bequest therein made by the promise and assurance of said Ritch, on behalf of himself and said Bulkley, that they would not apply or appropriate any part of the said residuary estate to their own use or benefit, but that they would appropriate and apply the same to the uses and purposes expressed in the tenth paragraph of said will, and at the time the said Daniel B. Fayerweather made and executed the said codicil he also delivered to the said Ritch a memorandum in writ-
26 ing, prepared by said Ritch, and executed by said Fayerweather, of which the following is a copy:

"NEW YORK, Dec. 11th, 1884.

PRIVATE MEMORANDUM.

I have made Messrs. Bulkley and Ritch my residuary legatees in the confidence that thereby my intentions as expressed in my will shall be carried into effect and without litigations on the part of any person or persons interested.

In case of my death I trust that they will take such steps, by will or otherwise, as will protect my estate

against the contingency of the death of either before my estate is settled and distributed.

D. B. FAYERWEATHER."

Said memorandum was addressed as follows:

"Messrs. J. L. Bulkley and T. G. Ritch. To be opened in case of my death."

The said defendant Ritch, on behalf of himself and the defendant Bulkley, promised and assured the said Daniel B. Fayerweather, either expressly or impliedly, that in the event that he should make said codicil and revoke the tenth parapraph of his said will, and devise and be-
27 queath the said residuary estate to the said Ritch and Bulkley, they would apply the said residuary estate to the purposes and for the uses stated in the said tenth paragraph of said will, and not otherwise; and, relying on said promises and assurance, the said Daniel B. Fayerweather made and executed said codicil and did devise and bequeath said residuary estate to said defendants.

On or about the 11th day of November, 1890, the said Daniel B. Fayerweather executed a further codicil to his will, by which he revoked the said devise and bequest to said Ritch and Bulkley, and made some disposition of his residuary estate which is well known to said defendant, Henry B. Vaughan, but is unknown to these complainants, and which they pray the said defendant may be
28 compelled to disclose, and that, upon such disclosure, such effect may be given thereto as may be just and equitable.

That said codicil was, on or about November 15th, 1890, by the defendant, Vaughan, destroyed unlawfully, and with the intention to facilitate him and the other defendants, his co-executors, in the concerted plan of coercion and oppression and duress, hereinafter alleged to have been by them practiced upon complainants to obtain the releases hereinafter mentioned.

On the 15th day of November, 1890, defendants Ritch, Bulkley and Vaughan or some one or more of them, act-

ing for himself or for themselves and for the other or others, advised and procured the said Daniel B. Fayerweather, to make and execute a further codicil to his will which is the codicil hereinbefore referred to as the fifth codicil, which is hereto annexed, whereby he purported to ratify his said last will and the first, second and third codicils thereto, except as therein modified, and to confirm the revocation of the tenth paragraph of said will and to amend and change the third paragraph of the said first codicil, dated and made December 13th, 1884, so as to read as follows:

"All the rest and residue of my estate whatsoever
29 character and wheresoever situated the same may be of which I shall die possessed and remaining after all the specific legacies in my said will and the several codicils thereto have been paid and all the provisions of said will and codicils have been fully complied with, and carried into effect, I give, devise and bequeath to Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, to them and their heirs forever."

The said Daniel B. Fayerweather was induced to make and execute the said codicil, and to make the devise and bequest contained in the said fifth codicil, by the promise and assurance of the defendants, Ritch and Vaughan, on behalf of themselves and said Bulkley that they
30 would not apply or appropriate any part of the said residuary estate to their own use or benefit, but that they would appropriate and apply the same to carry out the intentions of said will as expressed in the tenth paragraph thereof, except as modified by certain private memoranda in the possession of said Ritch, and the private memoranda referred to in said promise and assurances were the papers hereinbefore referred to, dated October 6th, 1884, and December 11th, 1884, and set forth at length in this bill of complaint, and also a certain other paper writing, of which the following is a copy:

"PRIVATE MEMORANDUM.

Having made inquiries with regard to Hampton and

Lincoln Universities, it is my judgment that the bequest to them should be withheld.

I think the bequest to Cornell University should not exceed $100,000.

If the North Western University at Evanston, Illinois, is in a prosperous condition, I would recommend that $100,000 be given to it.

If the following persons are in my employ at the time of my death, I suggest that they receive the following sums:

Rogers and Blake, $500 each; Gould, Campbell and Stone, $300 each, and Carpenter, $250; also James,
31 who now opens and closes the store, $100; John Dixon, $200.

I also wish that $1,000 be given Miss Joyce immediately after my decease, by addition to the provision made for her in my will.

March 22, 1899.

D. B. FAYERWEATHER."

The said defendants, Ritch and Vaughan, on behalf of themselves and said Bulkley, promised and assured the said Daniel B. Fayerweather, either expressly or impliedly, that in the event that he should make said fifth codicil, and devise and bequeath the said residuary estate to the said Ritch, Bulkley and Vaughan, they would apply
32 the said residuary estate to carry out the intentions of said will as expressed in the tenth paragraph thereof, except as modified by the said private memoranda and not otherwise, and relying in said promise and assurance, the said Daniel B. Fayerweather made and executed said codicil and did devise and bequeath said residuary estate to said defendants, Ritch, Bulkley and Vaughan.

The plaintiffs are advised and insist that the defendants Ritch, Bulkley and Vaughan, having obtained the residuary estate, devised and bequeathed by the said testator in the manner hereinbefore set forth, are chargeable in this Court, as trustees thereof, for complainants.

Further complaining, your orators further say that:

Said Daniel B. Fayerweather, at his decease, left him surviving a widow, Lucy Fayerweather, and next of kin, to wit: these complainants and the defendant, Lucy J. Beardsley, his nieces. Thereafter on or about the 24th day of February, 1891, the said will and testament and four codicils thereto, being the same of which copies are hereto annexed, were offered for probate after due notice to the widow of said Daniel B. Fayerweather and all of his next of kin and all persons having a right to notice, and said widow and next of kin, including complainants, appeared and interposed objections to such probate.

33 The objections to the probate of said last will and testament, Exhibit A, having been withdrawn, the same was admitted to probate by the Surrogate of New York, as hereinbefore alleged, on or about the 24th day of February, 1891, and thereafter a contest upon the probate of said codicils, Exhibits B, C, D, E, was still carried on before the said Surrogate; that pending such contest and proceedings to probate said will and codicils, the said Bulkley, Ritch and Vaughan were, as aforesaid, the trustees of the complainants in respect of the said residuary estate, and under a fiduciary duty towards complainants to make full disclose of all the facts affecting the rights of these complainants in and to said residuary estate, and not to set up or carry on any adversary

34 proceedings in derogation of such trust, or to combine or confederate with any of the other parties to this suit, against complainants to coerce them to surrender or release their interest in said residuary estate for the benefit of any other of these defendants, or to set up and maintain any colorable claims of right to the said interest of complainants in favor of any others of said defendants, or to raise any cloud upon the title thereto of complainants, and not to obstruct, hinder or delay complainants in the recovery of their said interests; and not to place complainants at any disadvantage in dealing with said Bulkley, Ritch and Vaughan or any others of said defendants, by withholding their said interest or threat-

ening them with litigation, duress of property or loss, to induce these complainants to surrender or release their said interest, and not to hold out or represent to complainants that any illegal or unfounded trust, existing or giving color as aforesaid, was a valid bar and impediment to the said rights of these complainants,

The said fifth codicil was executed by said Daniel B. Fayerweather when he was at the point of death. He was no longer rational or of sound or disposing mind. He was not able to read said codicil or to understand the import thereof. The said defendant Vaughan excluded from his presence all persons who were interested in
35 the disposition of said residuary estate, or who could impose any restraint upon the uncontrolled domination of said Vaughan over the acts of said Daniel B. Fayerweather. He was unable to hear or see said codicil or to sign the same. The act was the act and will of said Vaughan and not of said Daniel B. Fayerweather. Said Vaughan used the hand of said Daniel B. Fayerweather, to sign the codicil, but the mental act was that of said Vaughan.

The determination, however, that said codicil was invalid would, so far as complainants then knew or had reason to know or believe, leave in force the tenth paragraph of said will, so that they would have no standing to attack the validity of said codicil.

36 Complainants were not then inhabitants of the State of New York, and were not chargeable with knowledge of its laws. The effect, in the circumstances of this particular case, of the devise or bequest by said Daniel B. Fayerweather of more than one-half of his estate to the institutions mentioned in the tenth paragraph of said will, under the laws of said State, was a question resting in the judgment of lawyers learned in the laws of New York, who were chargeable with knowledge of the effect of said laws, and whose contentions these complainants were entitled to rely upon, under the circumstances, as equivalent to representations of fact. Complainants did not know and were not informed or advised that they had

a clear right to share as next of kin in one-half of said estate; but, on the contrary, said Ritch, who was a member of the bar of the State of New York, and the defendants, Bulkley and Vaughan, represented to these complainants by counsel learned in the law aforesaid that their said rights were unfounded and that they had no claims upon said estate which they could enforce.

Said defendants represented to these complainants that said Ritch, Bulkley and Vaughan were residuary legatees in their own right and free from any secret trust, of the whole of said residuary estate, and threatened to withhold all share in said estate and prolong litigation
37 to defeat all claims of complainants.

They falsely held out and pretended that complainants had no rights, which they could enforce or convey, and that to buy peace and as an act of grace and without any duty or obligation towards these complainants, they would give to complainants a sum, which was in fact equal to about one-eight of the actual interest of these complainants in said residuary estate, if complainants would execute the releases aforesaid and withdraw objections to the probate of said codicils and refrain from any further contest, objection or claims. The other defendants, mentioned in the ninth paragraph of said will, combined and confederated with said executors to secure said releases upon the misrepresentations aforesaid, and
38 agreed to the payment of said one-eighth of said residuary estate to these complainants, out of that estate itself, in the hands of said Ritch, Bulkley and Vaughan, to carry out the object of said conspiracy. These complainants were of scanty means and unable to continue a contest at a distance from their domicile, and unable to judge of the truth of the representations aforesaid. They were not upon equal terms with said defendants or with the other claimants to participate in said residuary estate. They were moved and induced by these representations, and by the advantage taken by said trustees of their superior knowledge of the facts and the laws of New York, to execute the releases described in

and annexed to their said answer in said action in the Supreme Court of the State of New York, aforesaid, and which they pray may be referred to and taken as part of this bill as if the same were herein set forth at length.

They received as a consideration for said releases and the waiver and agreements referred to in said answer or embodied therein, only the inadequate sum of $42,500 each, whereas, they were then each entitled to a share of said residuary estate amounting to upwards of $500,000, all of which was unknown to them, and concealed from them by said defendants.

By reason of the premises said settlement and agree-
39 ment and releases are, and each and every one of them is fraudulent and void, and ought to be so adjudged and said writings decreed to be given up to be cancelled.

These complainants are ready and willing and offer to come to an account with said defendants in respect to the payments so received by them and to do, stand by, and perform what may be equitable in the premises.

These complainants were not informed and did not learn or know the facts aforesaid respecting said fourth codicil until after the judgment of affirmance rendered in said action by said General Term, and then refrained from bringing this suit because of the pendency of the said action and the reasonable expectation of amending
40 and securing a trial of the issues therein.

Further complaining, your orators further say that: The said defendants, Ritch, Bulkley and Vaughan, have undertaken and assumed without lawful authority, to pay out of the said residuary estate, to the North Western University, the sum of $100,000, and have without lawful authority therefrom paid to George H. Blake, $1,000, to E. Gould, $500, to James Campbell, $500, to H. J. Stone, $500, to John E. Carpenter, $250, to John Dixon, $500, to Joseph Rogers, $1,500, to Anner Amelia Reynolds, $1,000, and an annuity of $4,000, for the period of her life, instead of the period mentioned in the said will (Anner Amelia Reynolds being the same person men-

tioned in said will by the name of Anner Amelia Joyce, and having intermarried with said John B. Reynolds), and said defendants, Ritch, Bulkley and Vaughan, have retained and now hold a large sum, to wit: about $125,000, as a sum necessary to produce said annuity, but for which they are accountable as a part of said residuary estate, as well as the sum of $22,412.50, the product thereof. They have also retained therefrom the sum of $523,000, as a sum necessary to produce an annuity to the said widow of said Daniel B. Fayerweather, deceased, which, except as such annuity shall be treated as a payment to her on account of her interest in the said re-
41 siduary estate, is without any authority, and since the death of said widow, which occurred on the 16th day of July, 1892, they are accountable for said sum of $523,000, as a part of said residuary estate and the produce thereof.

And said defendants have paid out of said residuary estate, without authority, other sums to the amount of $108,900, and upwards, for which they are accountable as part of said residuary estate.

YOUR ORATORS CHARGE AND ALLEGE that:

The decrees of the Surrogates of the County of New York whereby said testamentary papers were admitted to probate, are, and each of them is fraudulent, null and void, and should be set aside, and altogether held for naught; and that they should be relieved therefrom and restored
42 to all they have lost by reason thereof; and that your Honor should, in lieu thereof, establish and compel due performance of the true and lawful last will and testament of said Daniel B. Fayerweather, or, in lieu of any such, compel the payment and distribution of the estate of said Daniel B. Fayerweather, according to law.

And complainants further charge and allege that the said judgment of the Supreme Court of the State of New York, is a cloud upon the title of your orators to receive, have and recover of and from the defendants, Ritch, Bulkley and Vaughan, individually and as executors and trustees under the last will and testament of Daniel B.

Fayerweather, deceased, and under the codicils thereof, and as trustees in their own wrong and by operation of law, the proportionate share to which they are respective entitled, of the residuary estate of said Daniel B. Fayerweather; that said judgment is invalid, inoperative, null and void for matter not apparent upon its face, as against these complainants, because the same was not responsive to the allegations and proofs before said Court, because essential and material issues aforesaid were not determined therein, without any fault of complainants, and in despite of all due diligence and compliance with the legal conditions upon which they were so entitled, on the part
43 of these complainants; that said judgment was rendered upon fictions and inferences respecting material issues as aforesaid, contrary to the truth and the record thereof before said Court; and that the same is fraudulent, contrary to the law of the land, and beyond the jurisdiction of said Court, and in violation of complainants' right to due process of law, secured to them by the fourteenth amendment to the Constitution of the United States, and contrary to equity and good conscience.

That said judgment is not sufficient to bar or preclude these complainants from having an adjudication in this Court of the issues so raised by them in their said answer, in said action, and from an adjudication and decree herein that the said residuary estate is held by said de-
44 fendants, Ritch, Bulkley and Vaughan, in trust for the benefit and use of these complainants to the extent of their distributive share thereof, and for an accounting and payment thereof, for which they pray.

That by virtue of the premises these complainants are entitled as heirs at law of said Daniel B. Fayerweather, to have, receive and recover of and from said Ritch, Bulkley and Vaughan and from such of said defendants as may have received or may hereafter receive any part of said distributive and residuary share of said estate, except said Lucy J. Beardsley and said John B. Reynolds, as executor of the last will and testament and the codicil thereto of said Lucy Fayerweather, deceased, and as to them except

only to the extent of their respective shares thereof, under the statute of descent and distribution, so much of said residuary estate as constitutes their lawful proportion thereof, notwithstanding the releases aforesaid, and to have said releases adjudged null, void and of no effect.

And that they are entitled to such relief herein as may upon the whole case appear to be equitable.

For all of which special as well as for general relief, your orators pray.

And your orators further pray the order of this Court for a writ of injunction to be issued out of this Court and and under its seal, commanding the defendants and
45 each and every of them, their respective attorneys, counsel, solicitors, agents and officers, during the pendency of this suit and permanently to desist from proceeding in and about said action in the said Supreme Court, to enforce the same or to set up, assert, demand, plead or act under said judgment or move the said Supreme Court for any benefit, relief or advantage thereunder, and not to distribute, pay over, demand, receive, transfer or part with or encumber, the real or personal property received, controlled, possessed or owned by said Ritch, Bulkley and Vaughan, under or by force of their letters testamentary, aforesaid, in excess of one-half of the estate of said Daniel B. Fayerweather, which came into their hands or under their control, as such executors, ex-
46 cept in conformity with the decree of this Court herein.

And your orators further pray the order of this Court, appointing a Receiver to receive and hold subject to the order and decree of this Court in this suit, the said residuary estate of said Daniel B. Fayerweather, during the pendency of this suit.

To the end therefore that the said defendants may, if they can, show why your orators should not have the relief prayed herein, may it please your Honors to grant unto your orators the most gracious writ of subpœna of the United States of America to be directed to the said defendants thereby commanding them, at a certain day

and under a certain pain to be specified, personally to be and appear before your Honors in this Honorable Court and then and there to answer all and singular the premises, answer under oath being waived, and to stand to, abide and perform such order and decree therein as equity may require and as to your Honors shall deem meet.

EMMA S. FAYERWEATHER,
MARY W. ACHTER.

47

STATE OF IOWA, }
County of Muscatine, } ss.:

EMMA S. FAYERWEATHER and MARY W. ACHTER, being duly sworn, depose and say that they are the complainants aforesaid; that said complainants reside in the State of Iowa and are not now within the jurisdiction of this Court or in the State of New York; that deponent is informed and believes that the averments of said bill are true; and that the sources of her information and the grounds of her belief are the record of the said action in the bill of complaint described, as the same appears on file in the office of the Clerk of the County of New York, the briefs used by the respective parties on the ap-
48 peals therein, the testimony contained in the case on appeal in this action; the statements in Court of counsel for the parties thereto in proceedings in said action; the observations of the Court thereupon; and other information received by deponent from her authorized agent and other sources; that said bill of complaint is true to the best of deponent's knowledge, information and belief.

EMMA S. FAYERWEATHER,
MARY W. ACHTER.

Sworn to before me, this }
17th day of July, 1897. }

SCHUYLER VERDOW,
{ SEAL OF } Notary Public,
{ SAID NOTARY. } Muscatine County.

STATE OF IOWA, }
Muscatine County, } ss.:

I, J. W. EELLS, Clerk of the District Court of Iowa, within and for said county, do hereby certify that Schuyler Verdow, Esquire, whose name appears signed to the instrument of writing hereto attached, is now, and was at the date thereof, to wit, July 17th, 1897, an acting notary public within and for this county, duly commissioned and qualified; that said instrument is executed and acknowledged in accordance with the laws of this State; that his signature thereto is genuine and by the laws of this
49 State said Schuyler Verdow is authorized to administer oaths and take acknowledgments.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court at Muscatine this 17th day of July, A. D. 1897.

{ SEAL OF } J. W. EELLS,
{ SAID CLERK. } Clerk District Court.

50

SUPREME COURT OF THE STATE OF NEW YORK,

NEW YORK COUNTY.

THE TRUSTEES OF AMHERST COLLEGE, The Trustees of Dartmouth College, The Trustees of Hamilton College, The University of Rochester, the President and Trustees of Williams College,

PLAINTIFFS,

51

against

THOMAS G. RITCH, JUSTUS L. BULKLEY, and HENRY B. VAUGHAN, individually and as Trustees and Executors of the Last Will and Testament and Codicils thereto, of Daniel B. Fayerweather, deceased; Bowdoin College, The Union Theological Seminary in the City of New York, Cornell University, Lincoln University, The Rectors and Visitors of the University of Virginia, The Hampton Normal and Agricultural Institute, The Adelbert College of the Western Reserve University, Park College, John B. Reynolds and Morris B. Beardsley, as Executors of the Last Will and Codicil of Lucy
52 Fayerweather, deceased; Mary W. Achter, Emma S. Fayerweather, Lucy J. Beardsley, Anner Amelia Reynolds, North Western University, Mt. Sinai Hospital, The Presbyterian Hospital in the City of New York, The Women's Hospital in the State of New York, The Manhattan Eye and Ear Hospital, The New York Eye and Ear Infirmary, The Manhattan Dispensary in the City of New York, The Montefiore Home for Chronic Invalids, The Methodist Episcopal Hospital in the City of Brooklyn, New York; St. Luke's Hospital in the City of New York, The New York Cancer Hospital, The St. Vincent Hospital, in the City of New

York, The Trustees of Union College in the Town of Schenectady, in the State of New York; Haverford College, at Haverford College Post Office, Montgomery County, Penn.; The University of the City of New York, The University of Pennsylvania, The Brown University of Providence, R. I.; The President and Fellows of Harvard University, Wesleyan University at Middletown, Conn.; Princeton College at New Brunswick, N. J.; Wells College at Aurora, N. Y.; Elmira Female College, Rutgers College, Vassar College, Poughkeepsie, New York; Barnard College, The Peter Cooper Union for
53 the Advancement of Science and Art, The Shattuck School at Faribault, Minnesota; Lafayette College at Easton, Pa.; Maryville College, Trinity College at Hartford, Conn.; Wabash College, Marietta College, The President and Fellows of Yale College in New Haven, Conn.; The Trustees of Columbia College in the City of New York,

DEFENDANTS.

The plaintiffs, above named, respectfully show to this Court upon information and belief:

54 *First.*—That the plaintiffs, The Trustees of Hamilton College and The University of Rochester and the following-named defendants, to wit: The Union Theological Seminary in the City of New York, Cornell University, The Mt. Sinai Hospital, The Presbyterian Hospital in the City of New York, The Woman's Hospital in the State of New York, The Manhattan Eye and Ear Hospital, The New York Eye and Ear Infirmary, The Manhattan Dispensary in the City of New York, The Montefiore Home for Chronic Invalids, The Methodist Episcopal Hospital in the City of Brooklyn, New York, The St. Luke's Hospital in the City of New York, New York Cancer Hospital, The St. Vincent Hospital in the

City of New York, The Trustees of Union College, The University of the City of New York, Wells College, The Elmira Female College, Vassar College, Barnard College, The Peter Cooper Union for the Advancement of Science and Art, are domestic corporations organized under the laws of the State of New York.

The plaintiffs, the President and Trustees of Williams College, and the Trustees of Amherst College, and the defendants, the President and Fellows of Harvard University are foreign corporations, organized under the laws of the Commonwealth of Massachusetts.

The plaintiff, the Trustees of Dartmouth College, is a
55 foreign corporation existing under the laws of the State of New Hampshire.

The defendant, Brown University of Providence, Rhode Island, is a foreign corporation organized under the laws of the State of Rhode Island.

The defendants, The Wesleyan University and The President and Fellows of Yale College and Trinity College, are foreign corporations organized under the laws of the State of Connecticut.

The defendants, Rutgers College and Princeton College are foreign corporations organized under the laws of the State of New Jersey.

The defendants, Haverford College, Lincoln University and the University of Pennsylvania and Lafayette
56 College are foreign corporations organized under the laws of the State of Pennsylvania.

The defendants, Adelbert College of Western Reserve University and Marietta College are foreign corporations organized under the laws of the State of Ohio.

The defendant, Wabash College, is a foreign corporation, organized under the laws of the State of Indiana.

The defendant, the North Western University, is a foreign corporation, organized under the laws of the State of Illinois.

The defendant, the Shattuck School at Faribault, is a foreign corporation organized under the laws of the State of Minnesota.

The defendants, the Rector and Visitors of the University of Virginia and the Hampton Normal and Agricultural Institution are foreign corporations organized under the laws of the State of Virginia.

The defendant, Maryville College, is a foreign corporation organized under the laws of the State of Tennessee.

The defendant, Park College, is a foreign corporation organized under the laws of the State of Missouri.

Second.—That on or about the 15th day of November, 1890, Daniel B. Fayerweather departed this life at the city of New York, leaving a last will and testament together with four codicils thereto. The said last will and testament was executed on or about the 6th day of
57 October, 1884, and a copy thereof is hereto annexed, marked "Exhibit A," and is made a part of this complaint. The first of said codicils was executed by the testator on or about the 13th day of December, 1884, and a copy is hereto annexed, marked "Exhibit B," and is made a part of this complaint. The second of said codicils was executed on or about the 7th day of January, 1888, and a copy is hereto annexed, marked "Exhibit C," and is made a part of this complaint. The third of said codicils was executed on or about the 19th day of March, 1889, and a copy is hereto annexed, marked "Exhibit D," and is made a part of this complaint. The fourth of said codicils was executed on the 15th day of November, 1890, and a copy is hereto annexed, marked "Exhibit
58 E," and is made a part of this complaint.

The said will without the codicils was duly admitted to probate by the Surrogate of the County of New York, on or about the 25th day of February, 1891, and the said codicils, Exhibits B, C, D and E, were duly admitted to probate by the Surrogate of the County of New York and a decree adjudging the said instruments to have been properly executed and admitting the same to probate and establishing the same, together with the last will and testament, as a will of real and personal property and directing that the same be recorded, and that letters testamen-

tary issue thereon to the executors therein named was entered in the office of the Clerk of the said Surrogate on the 24th day of March, 1891, and thereafter on the 25th day of March, 1891, letters testamentary were issued by said Surrogate to the defendants, Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, as executors of the last will and testament of said Daniel B. Fayerweather, deceased, and the said defendants qualified as such executors and have taken possession of all the property and estate left by the said Daniel B. Fayerweather.

Third.—That the property and estate left by said Daniel B. Fayerweather at his decease, and which has come into the possession of the defendants, Thomas G.
59 Ritch, Justus L. Bulkley and Henry B. Vaughan, under the said last will and testament and the codicils thereto is of the value of upwards of $6,000,000, and that the residuary estate referred to in the tenth clause of the said last will and testament and in the first and fourth codicils thereto is of the value of upwards of $3,000,000, and that a considerable part of said residuary estate consists of real estate not situated in the State of New York.

Fourth.—That it was the intention and purpose of the said Daniel B. Fayerweather to devote the principal part of his estate upon his death to the several institutions of learning mentioned in the ninth paragraph of the said will, and he attempted to accomplish the said pur-
60 pose by the execution of the said will whereby, after making certain, definite, pecuniary legacies, he gave to each of said institutions specific sums as legacies, and gave all the rest, residue and remainder of his estate to his executors therein named to have and hold the same in trust to sell and convert the same into cash, and to divide the same equally among the several corporations mentioned in the ninth paragraph of the said will, share and share alike. The said will was prepared by the defendant, Thomas G. Ritch, acting as legal adviser and attorney of the said Daniel B. Fayerweather. At the time of the execution thereof the said Daniel B. Fayerweather was advised by the said Thomas G. Ritch, or those asso-

ciated with him, that, under the statute of the State of New York, no person having a husband, wife, child or parent could by a last will and testament devise or bequeath to such institutions as were named in the ninth paragraph of the said will, in trust or otherwise, more than one-half of his estate, after the payment of his debts, and that such devise or bequest would not be valid to the extent of more than such one-half.

The said Daniel B. Fayerweather, acting upon the advice of and by the procurement of said Ritch at the same time that he made and executed said will, executed and delivered to said Ritch a writing, of which the fol-
61 lowing is a copy:

"NEW YORK, Oct. 6, 1884.

This certifies that I have executed my will of this date, having been advised by my counsel of the provisions and restrictions of the law of this State relative to benevolent corporations.

I trust my heirs will permit the provisions of this, my will, to be carried into effect.

D. B. FAYERWEATHER."

Thereafter, the said Thomas G. Ritch advised and procured the execution by said Daniel B. Fayerweather,
62 of the first codicil, to his will Exhibit B, whereby he revoked the tenth paragraph of his will and whereby all the residue of the estate of said Daniel B. Fayerweather remaining after the first nine paragraphs of his will had been complied with and carried into effect, was devised and bequeathed to the defendants, Thomas C. Ritch, and Justus L. Bulkley. The said Daniel B. Fayerweather was induced to make and execute said codicil as aforesaid and to revoke the tenth paragraph of said will and to make the devise and bequest therein made by the promise and assurance of said Ritch on behalf of himself and said Bulkley, that they would not apply or appropriate any part of the said residuary estate to their own use or bene-

fit, but that they would appropriate and apply the same to the uses and purposes expressed in the tenth paragraph of said will and that, at the time the said Daniel B. Fayerweather made and executed said codicil he also theretofore delivered to the said Ritch a memorandum in writing prepared by said Ritch and executed by said Fayerweather, of which the following is a copy:

"NEW YORK, Dec. 11, 1884.

PRIVATE MEMORANDUM.

I have made Messrs. Bulkley and Ritch my residuary
63 legatees in the confidence that thereby my intentions as expressed in my Will shall be carried into effect and without litigations on the part of any person or persons interested.

In case of my death I trust they will take such steps by will or otherwise as will protect my estate against the contingency of the death of either before my estate is settled and distributed.

D. B. FAYERWEATHER."

Said memorandum was addressed as follows:

"Messrs. J. L. Bulkley and T. G. Ritch. To be opened in case of my death."

The said defendant Ritch, on behalf of himself and
64 the defendant Bulkley, promised and assured the said Daniel B. Fayerweather, either expressly or impliedly, that in the event that he should make said codicil and revoke the tenth paragraph of his said will and devise and bequeath the said residuary estate to the said Ritch and Bulkley, they would apply the said residuary estate to the purposes and for the uses stated in the said tenth paragraph of said will and not otherwise, and that, relying on said promises and assurance, the said Daniel B. Fayerweather made and executed said codicil and did devise and bequeath said residuary estate to said defendants.

On or about the 11th day of November, 1890, the said Daniel B. Fayerweather executed a further codicil to his will by which he revoked the said devise and bequest to said Ritch and Bulkley, and by which he restored the tenth paragraph of his said will, and whereby he did devise and bequeath his residuary estate to his executors named in the third codicil, to wit: the defendants Ritch, Bulkley and Vaughan, upon the trusts set out in the said tenth paragraph of said will.

On the 15th day of November, 1890, defendants Ritch, Bulkley and Vaughan, or some one or more of them, acting for himself or for themselves and for the other or
65 others, advised and procured the said Daniel B. Fayerweather to destroy the codicil hereinbefore last mentioned, and to make and execute a further codicil to his will, which is the codicil hereinbefore referred to as the fourth codicil, and which is hereto annexed, whereby he ratified and confirmed his said last will and the first, second and third codicils thereto, except as therein modified, and did confirm the revocation of the tenth paragraph of said will, and did amend and change the third paragraph of the said first codicil, dated and made December 13th, 1884, so as to read as follows:

"All the rest and residue of my estate, of whatsoever
66 character and wheresoever situated the same may be, of which I shall die possessed and remaining after all the specific legacies in my said will and the several codicils thereto have been paid and all the provisions of said will and codicils have been fully complied with and carried into effect, I give, devise and bequeath to Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, to them and their heirs forever."

The said Daniel B. Fayerweather was induced to make and execute the said codicil and to destroy the codicil made November 11th, 1890, and to make the devise and bequest contained in the said fourth codicil, by the promise and assurance of the defendants, Ritch

and Vaughan, on behalf of themselves and said Bulkley, that they would not apply or appropriate any part of the said residuary estate to their own use or benefit, but that they would appropriate and apply the same to carry out the intentions of said will as expressed in the tenth paragraph thereof, except as modified by certain private memoranda in the possession of said Ritch and the private memoranda referred to in said promise and assurances were the papers hereinbefore referred to, dated October 6th, 1884, and December 11th, 1884, and set forth at length in this complaint, at folios 18 and 20, and also a certain other paper writing, of which the following is a copy:

67

"PRIVATE MEMORANDUM.

Having made inquiries with regard to Hampton and Lincoln Universities, it is my judgment that the bequest to them should be withheld.

I think the bequest to Cornell University should not exceed $100,000.

If the North Western University at Evanston, Illinois, is in a prosperous condition, I would recommend that $100,000 be given to it.

If the following persons are in my employ at the time

68 of my death, I suggest that they receive the following sums:

Rogers and Blake, $500 each. Gould, Campbell and Stone, $300 each, and Carpenter, $250, also James, who now opens and closes the store, $100, John Dixon, $200.

I also wish that $1,000 be given Miss Joyce immediately after my decease, by addition to the provision made for her in my will.

March 22, 1889.

D. B. FAYERWEATHER."

The said defendants, Ritch and Vaughan, on behalf of themselves and said Bulkley, promised and assured the

said Daniel B. Fayerweather, either expressly or impliedly, that in the event that he should make said fourth codicil and destroy the codicil made November 11th, 1890, and devise and bequeath the said residuary estate to the said Ritch, Bulkley and Vaughan, they would apply the said residuary estate to carry out the intentions of said will as expressed in the tenth paragraph thereof, except as modified by the said private memoranda and not otherwise, and relying on said promise and assurance, the said Daniel B. Fayerweather made and executed said codicil and did devise and bequeath said residuary estate to said defendants, Ritch, Bulkley and
69 Vaughan.

Fifth.—The plaintiffs are advised and insist that the defendants, Ritch, Bulkley and Vaughan, having obtained the residuary estate, devised and bequeathed by the said testator in the manner hereinbefore set forth, are chargeable in this Court, as Trustees thereof, for the several corporations enumerated in the ninth paragraph of the said will, and among others, for these plaintiffs.

The plaintiffs are informed and believe that the said defendants, Ritch, Bulkley and Vaughan have undertaken to pay out of the said residuary estate, to the North Western University, the sum of $100,000, and have paid to George H. Blake, $1,000, and to E. Gould, $500,
70 and to James Campbell, $500, and to H. J. Stone, $500, and to John E. Carpenter, $250, and to John Dixon, $500, and to Joseph Rogers, $1,500, and to Anner Amelia Joyce, now intermarried with the defendant, John B. Reynolds, $1,000, being the same institution and persons mentioned and referred to, in the memorandum hereinbefore set forth, dated March 22, 1889, and that the said defendants have also undertaken to pay out of the said residuary estate to the defendant, Anner Amelia Reynolds, an annuity of $4,000, for the period of her life, instead of the period mentioned in the will, and to E. M. Upham who is now dead, an annuity of $1,000, for the period of his life, and have further paid certain servants

or employes of the said testator in addition to the amounts provided for under the said will, as follows:

To John C. Baylor, $200, to Kate Quinn, $100, to Albertine B. Hertzman, widow of E. H. Hertzman, $5,000, to Frank H. Sleeman, $200, to Clara Miller, wife of George L. Miller, $3,000, to Patrick Keefe, $200, to Owen Keefe, $200.

And that the said defendants have further paid to the defendant, Lucy J. Beardsley, wife of Morris B. Beardsley, out of the said estate, the sum of $100,000, in addition to the amounts provided for her by the said will, and

71 that the said defendants have, in pursuance of a certain settlement and agreement hereinafter set forth, paid to the widow and next of kin of the said testator, out of the said residuary estate, various sums amounting in the aggregate to about $310,000.

That the plaintiffs have no wish to dispute or interfere with any of the payments or undertakings aforesaid, but they allege that the said defendants Ritch, Bulkley and Vaughan hold the remainder of the said residuary estate, except the sums which they have, as aforesaid, paid or undertaken to pay, in trust, to apply the same to the uses and purposes mentioned in the tenth paragraph of the said will.

And the plaintiffs further allege that, disregarding the said trust and confidence and in violation of the obli-

72 gations which they assumed, as hereinbefore stated, the said defendants, Ritch, Bulkley and Vaughan, have undertaken to appropriate the remainder of said residuary estate, so received by them, and to apply the same to purposes other than those intended by the said testator and to which the defendants promised and agreed to devote the same, and have executed and threatened to carry into effect a certain declaration and voluntary deed of gift, a copy of which is attached to this complaint, as part thereof, marked "Exhibit F," and entitled "Deed of Gift," in and by which they declared their purpose to devote the greater part of the said residuary estate to purposes other than those expressed and intended by the

said testator and other than those to the said defendants so promised and agreed to devote the same.

Sixth.—The plaintiffs further allege, upon information and belief, that upon the death of the said Daniel B. Fayerweather the said will and testament and codicils were offered for probate, after due notice to the widow of said Daniel B. Fayerweather and all of his next of kin, and all persons having a right to notice, and said widow and next of kin appeared and interposed objections to such probate. The objections to the said last will and testament (Exhibit A) having been withdrawn, the same
73 was admitted to probate by the Surrogate of New York, as hereinbefore alleged, upon the 25th day of February, 1891, and thereafter a contest upon the probate of the said codicils (Exhibits B, C, D, E), was still carried on before the said Surrogate; that pending such contest and proceedings to probate said will and codicils, the said Bulkley, Ritch and Vaughan were, as aforesaid, the trustees of the plaintiffs, and were so acting in the proceedings to prove said will and testament and codicils, and as such they effected a settlement and entered into an agreement with said widow and all of said next of kin, whereby the said executors and trustees agreed to pay said widow and next of kin, out of the funds of said estate, the sum of $310,000, and in consideration thereof, the
74 said widow and the said next of kin, including all the persons who were contesting or entitled to contest said will, or in any event to take any part of said estate, as in case of intestacy, agreed to withdraw their contest and release all their interest in the said estate and discharge the same of and from all claims and demands whatsoever on their part; thereupon said widow and next of kin did withdraw their contest and their objections to the probate of said codicils, and consented to such probate.

Said agreement was made and said consent was given, with full knowledge on the part of said widow and next of kin that the said Ritch, Bulkley and Vaughan had

made the promises and assurances hereinbefore set forth and that the said testator had devised the said residuary estate to them relying upon the said promises and assurances and that they were chargeable as trustees for the faithful performance thereof.

Thereafter, and on or about the 12th day of June, 1891, the said sum of $310,000, was duly paid in pursuance of said agreement of settlement, and the said widow and next of kin, executed and delivered to said Ritch, Bulkley and Vaughan as trustees and as executors and individually, general releases under seal.

75 *Seventh.*—The plaintiffs further allege that the defendants, Bowdoin College, the Wesleyan University, the President and Fellows of Yale College, the Trustees of Columbia College, the Union Theological Seminary in the City of New York, Cornell University, Lafayette College, Lincoln University, the Rector and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, Maryville College, Marietta College, Adelbert College, Wabash College and Park College, are, together with these plaintiffs, the institutions, and corporations mentioned in the ninth paragraph of the said will and are the beneficiaries entitled to the said residuary estate or to such part thereof as may, in this Court, be charged with the trust hereinbefore stated.

76 The defendants, The North Western University, The Mt. Sinai Hospital, The Presbyterian Hospital, The Woman's Hospital, The Manhattan Eye and Ear Infirmary, The Manhattan Dispensary, The Montefiore Home for Chronic Invalids, The Methodist Episcopal Hospital of Brooklyn, The St. Luke's Hospital, New York Cancer Hospital, The Society of St. Vincent de Paul, Union College, Haverford College, The University of the City of New York, The University of Pennsylvania, Brown University, The President and Fellows of Harvard University, Wesleyan University, Princeton College, Rutgers College, Wells College, The Elmira Female College, Vassar College, Barnard School for Women, the Peter Cooper Union

for the Advancement of Science and Art, The Shattuck School, Lafayette College, Maryville College, Trinity College, Wabash College, Marietta College, The President and Fellows of Yale College, and the Trustees of Columbia College and Anner Amelia Reynolds claim to have some interest in the said residuary estate under and by virtue of the so-called deed of gift, hereinbefore referred to.

The defendants, John B. Reynolds and Morris B. Beardsley, as executors of the last will and testament of Lucy Fayerweather, Mary W. Achter, Emma S. Fayer-
77 weather, Lucy J. Beardsley, Anner Amelia Reynolds claim to have some interest in the said residuary estate, as next of kin and as executor of the widow of the said Daniel B. Fayerweather.

WHEREFORE the plaintiffs pray the judgment of the Court as follows:

1. That it be adjudged and decreed that all the residuary estate left by the said Daniel B. Fayerweather and devised and bequeathed to the defendants, Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, was received and is held by them, in trust, for the purposes hereinbefore set forth.
78

2. That it be adjudged and decreed that the said residuary estate devised and bequeathed to the defendants, Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, was received and is held by them in trust for these plaintiffs, and the several institutions named in the ninth paragraph of the will, for the purpose of carrying out the intentions of the said testator as expressed in the tenth paragraph of said will except as modified by the private memoranda hereinbefore set forth.

3. That it be adjudged and decreed that all of the said residuary estate devised and bequeathed to the defend-

ants, Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, except that part thereof actually heretofore paid out by them to the widow and next of kin of said testator or other persons, as hereinbefore alleged to have been paid, and except that part thereof necessary to provide for the payment to the North Western University, E. M. Upham, and Anner Amelia Reynolds, undertaken by said defendants, as hereinbefore set forth, is now held by the said defendants Ritch, Bulkley and Vaughan, in trust for these plaintiffs and the said, several institutions mentioned in the ninth paragraph of said will upon the trust stated in the tenth paragraph of the said
79 will.

4. That the said defendants, Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, be enjoined and restrained from distributing the said residuary estate in the manner declared to be intended by them, in the declaration or so-called deed of gift (Exhibit F,) attached to the complaint.

5. That the said defendants, Ritch, Bulkley and Vaughan, may be required to account for the moneys received by them, under said last will and testament and codicils, and that they may be required to apply so much thereof as they may have received upon the trust hereinbefore stated, to the purposes of said trust.
80

6. That the ultimate rights of the plaintiffs as between them and each of them and every of the other defendants herein be determined by the judgment in this action in accordance with the allegations of this complaint, and the prayer hereinbefore contained.

7. That the plaintiffs may have such other relief as may be just and equitable.

PUTNEY & BIGELOW,
Attorneys for Plaintiffs,
115 Broadway,
New York City.

ELIHU ROOT,
HORACE RUSSELL,
FRANCIS LYNDE STETSON,
MARTIN W. COOKE,
Counsel.

81 (Verification.)

82

SUPREME COURT,

NEW YORK COUNTY.

THE TRUSTEES OF AMHERST COLLEGE and others,
Plaintiffs,

against

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B.
83 VAUGHAN, individually and as Trustees and Executors of the Last Will and Testament and Codicils thereto of Daniel B. Fayerweather, deceased, and others,
Defendants.

The answer of the defendants, John B. Reynolds and Morris B. Beardsley, as executors of the last will and codicil of Lucy Fayerweather, deceased, and also of the defendants, Mary W. Achter, and Emma S. Fayerweather, impleaded with Thomas G. Ritch and others, to the complaint in the above-entitled action.

84

I.

For a defense and counterclaim to the cause of action set forth in the complaint herein, and also as the grounds for the affirmative relief prayed for in this answer these defendants, severally, upon information and belief, allege as follows:

First.—That Daniel B. Fayerweather, a citizen and resident of the City and State of New York, domiciled in said city, died November 15th, 1890, at said city, leaving a widow Lucy Fayerweather and three nieces, the defend-

ants Mary W. Achter, Emma S. Fayerweather and Lucy J. Beardsley, his only heirs at law and next of kin.

Second.—That said widow Lucy Fayerweather died July 16th, 1892, leaving a last will and testament and a codicil thereto; that said will and codicil were duly admitted to probate by the Surrogate of the County of New York and recorded as a will and codicil of real and personal estate on or about September 9th, 1892, and letters testamentary thereon were duly issued by said Surrogate to John B. Reynolds and Morris B. Beardsley, the executors named therein, who duly qualified and entered
85 upon said office, and still continue therein, and, as such executors, are made parties defendant to this action.

Third.—That said Daniel B. Fayerweather left a last will and testament, together with five codicils thereto. The said last will was executed by said testator on or about the sixth day of October, 1884, and a copy thereof is annexed to the complaint herein marked "Exhibit A," and is hereby made a part of this answer, the same as if annexed hereto. The first of said codicils was executed by said testator on or about the 13th day of December, 1884, and a copy thereof is annexed to the complaint herein marked "Exhibit B," and is hereby made a part of this answer, the same as if annexed hereto. The second of said codicils was executed by said testator on
86 or about the 7th day of January, 1888, and a copy thereof is annexed to the complaint herein marked "Exhibit C," and is hereby made a part of this answer, the same as if annexed hereto. The third of said codicils was executed by said testator on or about the 19th day of March, 1889, and a copy thereof is annexed to the complaint herein, marked "Exhibit D," and is hereby made a part of this answer, the same as if annexed hereto. The fourth of said codicils was executed by said testator on the 11th day of November, 1890, but these defendants are unable to furnish a copy thereof. The fifth of said codicils was executed by said testator on the 15th day of November, 1890, and a copy thereof is annexed to the com-

plaint herein, marked "Exhibit E," and is hereby made a part of this answer, the same as if annexed hereto.

Fourth.—That the property and estate left by said Daniel B. Fayerweather was, at the time of his decease, of the value of about six millions of dollars, and the residuary estate referred to in the tenth clause of his said will and in the first and fifth codicils, then was, and still is, of the value of about three million five hundred thousand dollars; that about five-sixths of said estate consists of personal property, and the greater part of the real estate of said testator is situated in the State of New
87 York.

Fifth.—That, immediately after the death of said Daniel B. Fayerweather, the defendants, Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, who were nominated and appointed executors of his said will and codicils and trustees of his estate, took possession of the property and estate of said testator, and, on the 24th day of February, 1891, before the probate of said wills or codicils, claiming to act as residuary devisees and legatees under said will and codicils in their own right, executed and delivered the deed of gift, dated that day, a copy of which is annexed to the complaint herein, marked "Exhibit F," and is hereby made a part of this an-
88 swer, the same as if annexed hereto. Said delivery was made to Stephen P. Nash and Henry Stoddard, named in said deed of gift, to hold for the donees named therein, and said donees, except some who have been paid as hereinafter stated, are made parties defendant to this action.

Sixth.—That the said will of Daniel B. Fayerweather, without the codicils, was admitted to probate by the Surrogate of the County of New York on or about the 25th day of February, 1891; and the said codicils (Exhibits B, C, D and E) were admitted to probate by said Surrogate March 24th, 1891; and a decree, adjudging the said in-

struments to have been properly executed, and admitting the same to probate as a will and codicils of real and personal estate, and directing the same to be recorded, and that letters testamentary issue thereon to the said executors therein named, was entered in the office of the Clerk of said Surrogate on the said 24th day of March, 1891; and thereafter, on the 25th day of March, 1891, letters testamentary thereon were issued by said Surrogate to the said executors, the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, who accepted the same and qualified as such executors and still continue in office and as such executors, and individually, and
89 also as trustees of the estate of said testator, are made parties defendant to this action.

Seventh.—That it was the intention and purpose of the said Daniel B. Fayerweather to devise and bequeath the largest part of his estate to benevolent, charitable, literary, scientific, religious and missionary societies, associations or corporations. But, as he had a wife, the said Lucy Fayerweather, he was prohibited by the laws of the State of New York (Chap. 360, Laws of 1860) from devising or bequeathing to such societies, associations or corporations, in trust or otherwise, more than one-half of his estate, after the payment of his debts; and such devises or bequests were thereby declared to be valid only to
90 the extent of such one-half, and no more. The specific legacies to the five hospitals named in the eighth clause of his said will, and to the twenty colleges named in the ninth clause of his said will, amounting in all to two millions, one hundred and ninety-five thousand dollars ($2,195,000), exhausted about one-half of his estate remaining after the payment of his debts.

The said Thomas G. Ritch was an attorney and counsellor-at-law. He had been for many years the legal and confidential adviser of said Daniel B. Fayerweather, who trusted in him implicitly. Said Ritch prepared the said will and procured the execution thereof by said testator. He advised him of the provisions of said statute. Acting

upon the advice and procurement of said Ritch, said testator, at the time that he made and executed said will, also executed and delivered to said Ritch a writing, of which the following is a copy:

NEW YORK, October 6th, 1884.

"This certifies that I have executed my will of this "date, having been advised by my counsel of the provis- "ions and restrictions of the law of this State relevant to "benevolent corporations. I trust my heirs will permit "the provisions of this my will to be carried into
91 "effect.

D. B. FAYERWEATHER."

By the tenth clause of said will the entire residuary estate of Daniel B. Fayerweather, real and personal, was devised and bequeathed as follows:

"*Tenth.*—All the rest, residue and remainder of my "estate, real and personal, of which I shall die possessed, "I give, devise and bequeath unto my executors, to have "and to hold the same, in trust, nevertheless, to sell and "convert into cash and to divide the same equally among "the several corportions mentioned in the ninth para- "graph of this my will, share and share alike."

92 The said corporations named in said ninth paragraph were twenty colleges, of which five are plaintiffs herein, and the remainder are defendants herein.

By the eleventh clause of said will the said Justus L. Bulkley and Thomas G. Ritch were appointed executors of said will and trustees of said estate.

Thereafter the said Thomas G. Ritch advised the said Daniel B. Fayerweather that in order to carry out his intentions as expressed in said will, it was necessary to make a codicil to said will, revoking the tenth clause of said will and devising and bequeathing his entire residuary estate to said Bulkley and Ritch, individually in the form of an absolute devise and bequest to them, but which

they promised and agreed to receive and hold upon the secret trust and confidence to carry out his intentions as expressed in the tenth clause of his said will. Induced by said advice, and in reliance upon the said promise and agreement of said Bulkley and Ritch, the said Daniel B. Fayerweather executed the said first codicil, "Exhibit B," whereby he revoked the said tenth paragraph of his will, and whereby he devised and bequeathed to the defendants, Thomas G. Ritch and Justus L. Bulkley, all the residue of his estate remaining after payment of his debts, and after the first nine paragraphs of his said will had been complied with and carried into effect. At
93 the time the said Daniel B. Fayerweather made and executed said codicil, he also delivered to the said Ritch a memorandum in writing, theretofore prepared by said Ritch and executed by said Fayerweather, for said Ritch and Bulkley, of which the following is a copy:

"NEW YORK, December 11th, 1884.

"PRIVATE MEMORANDUM.

"I have made Messrs. Bulkley and Ritch my residuary "legatees, in the confidence that thereby my intentions, as expressed in my will, shall be carried into effect, and "without litigations on the part of any person or persons "interested.

94 "In case of my death I trust they will take such "steps by will or otherwise as will protect my estate "against the contingency of the death of either before my "estate is settled and distributed.

"D. B. FAYERWEATHER."

Said memorandum was enclosed in a sealed envelope and addressed as follows: "Messrs. J. L. Bulkley and T. G. Ritch. To be opened in case of my death."

The said defendants Ritch and Bulkley, promised and assured the said Daniel B. Fayerweather that, in the event that he should make and execute said codicil, they would apply the said residuary estate to the purposes and

for the uses stated in the said tenth paragraph of said will, and not otherwise, and the said Daniel B. Fayerweather made and executed said codicil in reliance on said promises and assurances, and in full faith and confidence that the same and the said secret trust would be kept and performed by said devisees and legatees.

The said devise and bequest of the residuary estate of said testator, contained in said codicil, were procured by said Thomas G. Ritch taking undue advantage of his position as attorney and adviser of said testator, and by undue influence, misrepresentation, coercion and fraud on the part of said Ritch acting for himself and said
95 Bulkley; the said residuary devise and bequest so obtained were frauds upon said testator, and were and are fraudulent and void as against the widow and heirs at law and next of kin of said testator; and, upon the death of said testator, the said defendants Ritch and Bulkley became, and ever since have been, and now are, trustees of said residuary estate for said widow and the executors of her will and for said heirs at law and next of kin as hereinafter set forth.

Eighth.—That by the second of said codicils, dated January 7th, 1888 (Exhibit C), the defendant Henry B. Vaughan was also nominated and appointed an executor of said will and codicils and a trustee of the estate of
96 Daniel B. Fayerweather. He had not been included in the devise and bequest of said residuary estate to said Ritch and Bulkley in said first codicil and was ignorant thereof, until the month of November, 1890, when he discovered the same and supposed it to be an absolute devise and bequest to said Ritch and Bulkley individually. At that time the said Daniel B. Fayerweather was upon his death bed. On or about the 11th day of November, 1890, the said defendant Henry B. Vaughan, without consultation with or the knowledge or consent of the said Ritch or Bulkley procured the said Daniel B. Fayerweather to execute a fourth codicil to his said will (not among the exhibits hereinbefore mentioned), by which codicil he re-

voked the said devise and bequest to said Ritch and Bulkley made in said first codicil as aforesaid, and made numerous bequests to individuals and extended the annuity to Anner Amelia Reynolds for the period of her life, and restored the said tenth paragraph of his will, and did devise and bequeath his residuary estate to all his executors, Ritch, Bulkley and Vaughan, upon the said trusts set out in the tenth paragraph of said will.

Between the 11th and 15th days of November, 1890, the said Vaughan informed the said Ritch and Bulkley of the execution by said Daniel B. Fayerweather of said codicil of November 11th, 1890. Said Ritch there-
97 upon explained to said Vaughan the secret trust aforesaid, upon which the said residuary estate had been devised and bequeathed to himself and Bulkley, and the necessity therefor to evade, if possible, the provisions of said Chapter 360 of the Laws of 1860. He thereupon obtained the consent of said Vaughan to a destruction of said fourth codicil of November 11th, 1890, and to a restoration of said secret trust, provided said Vaughan was included in said residuary devise and bequest with said Ritch and Bulkley. In pursuance of said arrangement, on the 15th day of November, 1890, the defendants Ritch, Bulkley and Vaughan, or some one or more of them acting for all, advised and procured the said Daniel B. Fayerweather to make and execute a further codicil to his
98 will, which is the codicil hereinbefore referred to as the fifth codicil (Exhibit E), whereby he ratified and confirmed his said will, and the first, second and third codicils thereto, except as therein modified, and did confirm the revocation of the tenth paragraph of said will, and did amend and change the third paragraph of the said first codicil, dated and made December 13th, 1884, (Exhibit B), so as to read as follows:

"All the rest and residue of my estate, of whatsoever "character, or wheresoever situated the same may be, of "which I shall die possessed and remaining after all the "specific legacies in my said will and the several codicils

"thereto have been paid, and all the provisions of said "will and codicils have been fully complied with and "carried into effect, I give, devise and bequeath to Justus "L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, "to them and their heirs forever."

The said Daniel B. Fayerweather was induced to make and execute the said last codicil, and to make the said devise and bequest of his residuary estate, contained in said last codicil, by the promise and agreement of the said defendants Ritch, Bulkley and Vaughan that they would not apply or appropriate any part of the said residuary estate to their own use or benefit, but would
99 receive and hold the same upon the secret trust and confidence to appropriate and apply the same to carry out the intentions of said testator as expressed in his said will, except as modified by certain private memoranda of said testator in the possession of said Ritch. The private memoranda referred to in said promise and agreement, were the papers hereinbefore referred to, dated October 6th, 1884, and December 11th, 1884, already set forth at length in this answer, and also a certain other paper writing, of which the following is a copy:

PRIVATE MEMORANDUM.

"Having made inquiries with regard to Hampton
100 "and Lincoln Universities, it is my judgment that "the bequest to them should be withheld.

"I think that the bequest to Cornell University "should not exceed $100,000.

"If the North Western University of Evanston, Illi- "nois, is in a prosperous condition, I would recommend "that $100,000 be given to it.

"If the following persons are in my employ at the "time of my death, I suggest that they receive the fol- "lowing sums:

"Rogers and Blake, $500 each. Gould, Campbell "and Stone, $300 each, and Carpenter, $200; also James,

"who now opens and closes the store, $100. John "Dixon, $200.

"I also wish that $1,000 be given to Miss Joyce, im- "mediately after my decease, by addition to the pro- "visions made for her in my will.

"March 22d, 1889.

"D. B. FAYERWEATHER."

The said defendants Ritch, Bulkley and Vaughan promised and assured the said Daniel B. Fayerweather that, in the event that he should make said last
101 codicil, and devise and bequeath the said residuary estate to said Ritch, Bulkley and Vaughan, they would not apply or appropriate any part of the said residuary estate to their own use or benefit, but would receive and hold the same upon the secret trust and confidence aforesaid, and would appropriate and apply the said residuary estate to carry out the intentions of said testator as expressed in his said will, except as modified by the said private memoranda, and not otherwise; and, relying on said promises and assurances, the said Daniel B. Fayerweather made and executed said codicil, and did devise and bequeath the said residuary estate to said defendants Ritch, Bulkley and Vaughan, in full faith and confidence that the said promises and assurance and
102 the said secret trust would be kept and performed by the said devisees and legatees.

Immediately after the execution of said last codicil the defendant Henry B. Vaughan destroyed, or caused to be destroyed, the said codicil of November 11th, 1890, and the said Daniel B. Fayerweather died. The said codicil was not destroyed by or in the presence of said testator, and was never revoked by said testator. The said codicil has never been offered for probate.

The said devise and bequest of the residuary estate of said testator, contained in said last codicil of November 15th, 1890, were procured by taking undue advantage of the condition of said testator, who was then at the

point of death, and by undue influence, misrepresentation, coercion and fraud on the part of said Ritch, Bulkley and Vaughan, acting as advisers of said testator; the said residuary devise and bequest, so obtained, and the destruction of said codicil of November 11th, 1890, were both frauds upon said testator, and were and are fraudulent and void as against the widow and heirs at law and next of kin of said testator, and upon the death of said testator the said defendants Ritch, Bulkley and Vaughan became, and ever since have been, and now are, trustees of said residuary estate, for said widow and the executors of her will, and for said heirs at law and
103 next of kin as hereinafter set forth.

Ninth.—That by the several charters or acts of incorporation of the several societies, associations or corporations which are parties to this action, and by the laws of the several States where the same are respectively incorporated, and by the law of this State, any devise or bequest made to them, or for their benefit, in trust or otherwise, within sixty days of the death of a testator, who leaves a wife him surviving, is invalid and void. That, by reason thereof, the said devises and bequests of the residuary estate of said Daniel B. Fayerweather, made to said Ritch, Bulkley and Vaughan, in said codicils of November 11th and 15th, 1890, as aforesaid, were and are absolutely invalid and void, and the said devisees
104 and legatees Ritch, Bulkley and Vaughan, upon the death of said testator, became and were, and ever since have been and now are trustees of the residuary estate devised and bequeathed by said codicils, and seized and possessed of the same in trust for the said Lucy Fayerweather, the widow of said testator, and since her death for the executors of her will, to the extent of one-half part thereof, and for the said defendants Mary W. Achter, Emma S. Fayerweather and Lucy J. Beardsley, heirs at law and next of kin of said testator, to the extent of the other half part thereof, in equal shares, except as hereinafter stated.

Tenth.—That by the laws of the State of New York the devises and bequests made in said will, or any of said five codicils, to the said several societies, associations or corporations which are parties to this action, or any of them, or made to the said Ritch and Bulkley, or to the said Ritch, Bulkley and Vaughan, as aforesaid, as executors, or as trustees, or individually, upon the secret trust, confidence, promise, assurance or understanding aforesaid, in trust or otherwise, for the benefit of the said societies, associations or corporations, or any of them, which devises and bequests exeed in the aggregate more than one-half of said Daniel B. Fayerweather's es-
105 tate, after the payment of his debts, are only valid to the extent in the aggregate of said one-half and no more; and as to the excess over said one-half (which excess in this case includes substantially the whole of said residuary estate), the said Ritch, Bulkley and Vaughan, as executors and trustees under said will and codicil, and as residuary devisees and legatees, as aforesaid, upon the death of said testator became and were, and ever since have been and now are, trustees thereof, and seized and possessed of the same in trust for the said Lucy Fayerweather, the widow of said testator, and for the executors of her will since her death, as aforesaid, to the extent of one-half part of such excess, and for the said Mary W. Achter, Emma S. Fayerweather and Lucy
106 J. Beardsley, the heirs-at-law and next of kin of said testator to the extent of the other half part thereof in equal shares.

Eleventh.—That, after the death of said Daniel B. Fayerweather the said Ritch, Bulkley and Vaughan, having obtained possession of his estate, falsely and fraudulently denied that said residuary estate had been devised and bequeathed to them upon any trust or confidence whatsoever, and claimed that the same was their sole and absolute property to do with as they saw fit; and, acting upon said claim, and in violation of their duties as such trustees, they executed and delivered the said deed of

gift, as aforesaid, dated February 24th, 1891 (Exhibit F). Thereafter they made the several payments out of said residuary estate, which are set forth in the fifth subdivision of the complaint herein, but, except said payments, they have kept possession and control of the whole of said residuary estate and now are in the possession and control thereof. So far as said payments have been made to the widow and next of kin of the said testator, these defendants say that they should be accounted for in this action and charged against the shares or portions of said estate equitably belonging to the estate of said widow, and to the said next of kin respectively, as
107 the same shall be ascertained and determined in this action. So far as said specific payments have been made to others, these defendants have no wish to dispute or interfere with the same. The part of said residuary estate remaining in the possession and control of said defendants Ritch, Bulkley and Vaughan, at the commencement of this action is sufficient to pay to these defendants the portions of said residuary estate to which they are respectfully entitled, as aforesaid, and these defendants claim that said Ritch, Bulkley and Vaughan are trustees thereof for these defendants respectively to the extent and in the proportions aforesaid, and chargeable and accountable to them for the same as such trustees in this action.

108 *Twelfth.*—That in the proceedings in the Surrogate's Court for the probate of the will and four codicils of Daniel B. Fayerweather, deceased, the said widow, Lucy Fayerweather, and the said Mary W. Achter and Emma S. Fayerweather, filed objections to such probate, but subsequently, as part of the fraudulent settlement hereinafter set forth, withdrew said objections and consented to said probate.

Thirteenth.—That after the death of said Daniel B. Fayerweather, the said defendants Ritch, Bulkley and Vaughan, having obtained possession of his estate, and

standing as to said widow in the fiduciary relation of her trustee under the fifth clause of her husband's will, and standing as to both said widow and said heirs at law and next of kin of said testator in the fiduciary relations aforesaid of said will and estate and of trustee of said estate, and also standing in the fiduciary relation of trustee for them of the whole or the greater portion of said residuary estate as aforesaid, took undue advantage of their said fiduciary relations and of their superior situation and knowledge, in respect to said estate, to defraud the said widow, Lucy Farnsworth, who was then a feeble invalid, suffering from the mortal disease of which she soon after died, and also to defraud the said Mary W. Archer and Emma S. Farnsworth, who were then residents of the State of Iowa, of their respective rights and interests in said residuary estate; and by falsely and fraudulently denying the said sworn trust upon which said residuary estate had been devised and bequeathed to them as aforesaid, and by falsely and fraudulently claiming the same as their own absolute property and attempting to dispose of the same as such by the said deed of gift, in violation of their duty as such trustees, and by fraudulently denying and concealing the rights of their said *cestuis que trustent* to any part of the same, and by threatening to continue said unjust acts;

And by refusing and neglecting to render to said widow and next of kin while such unjust conduct continued, and thereby to the time of the filing of this bill, any account of the trust estate, and by refusing and neglecting to pay to said widow and next of kin while such unjust conduct continued, and to withhold all payments from the said widow and next of kin while such unjust conduct continued, and thereby to tire them out and impoverish them, and by omitting to make full and fair disclosure of the truth in respect to the said trust and the said estate and the rights of their said *cestuis que trustent* thereto, and by otherwise abusing their position and violating their duties to their said *cestuis que trustent*, they coerced, deceived and induced the said widow, Lucy Farnsworth, who was ignorant of her rights in said estate and of the facts and law in respect thereto, and who was weak and timid, and, by reason of her enfeebled condition, easily persuaded to accept anything rather than litigation with her said trustees, to withdraw her objections to the pro-

bate of said will and codicils and consent to such probate, and to release to them, to the said Ritch, Bulkley and Vaughan, her interest in said residuary estate, which interest was of the value of about fifteen hundred thousand dollars, for the grossly inadequate consideration of an increase in the annuity, to be paid by said executors as her trustees under the fifth clause of said will, from fifteen thousand to twenty-five thousand dollars annually, payable to her quarterly for life, and for the further sum of two hundred and twenty-five thousand dollars, of which twenty-five thousand dollars were paid to her attorney and counsel for his fee, and two hundred thousand
111 dollars to herself.

And said Ritch, Bulkley and Vaughan did likewise and by the same method coerce, deceive and induce the said Mary W. Achter and Emma S. Fayerweather, who were ignorant of their rights in said estate and of the facts and law in respect thereto, and who, by reason thereof and of their distant residence and scanty means, were easily persuaded to accept anything rather than a prolonged and expensive litigation with said executors and trustees, to withdraw their objections to the probate of said will and codicil and consent to such probate, and to release to them, the said Ritch, Bulkley and Vaughan, their respective interests in said residuary estate, which interests were at that time each of the value of about
112 five hundred thousand dollars, for the grossly inadequate consideration of forty-two thousand five hundred dollars each, of which twenty-five thousand dollars were paid to their attorney and counsel for his fee, and the remaining sixty thousand equally to said Mary W. Achter and Emma S. Fayerweather. That pursuant to the the arrangement with their said *cestuis que trustent* thus fraudulently coerced and procured, the said Ritch, Bulkley and Vaughan executed and delivered to said Stephen P. Nash and Henry Stoddard, to whom said deed of gift had been delivered as aforesaid, an additional instrument, dated March 5th, 1891, of which a copy is hereunto annexed as part of this answer, marked "Exhibit G;" and

the said Lucy Fayerweather, Mary W. Achter and Emma S. Fayerweather executed and delivered to said Ritch, Bulkley and Vaughan the written instrument dated March 5th, 1891, of which a copy is hereunto annexed as part of this answer, marked "Exhibit H." Thereupon the said Ritch, Bulkley and Vaughan paid the said considerations for said releases, aggregating $310,000, to their said *cestuis que trustent* and their attorneys respectively, and thenceforth, during the remainder of her life, paid said increased annuity quarterly to said Lucy Fayerweather, making all such payments out of said residuary estate of about three million dollars in their hands which
113 equitably belonged to their said *cestuis que trustent*.

Upon the payment of said $310,000, as aforesaid, the said Lucy Fayerweather and the said Mary W. Achter and Emma S. Fayerweather executed and delivered to said Ritch, Bulkley and Vaughan the releases in writing under seal, of which copies are hereunto annexed as part of this answer, marked respectively Exhibits I, J and K. And by reason of the premises these defendants say that the said settlement and releases are, and each and every one of them is fraudulent and void, and should be so adjudged, and vacated and set aside in this action upon such terms as may be just and equitable; and these defendants deny that said agreements were made or said consents or releases obtained or given as alleged in
114 the complaint herein, or otherwise than as above stated.

Fourteenth.—These defendants, the said executors of the will and codicil of Lucy Fayerweather, for themselves and for her estate, do hereby offer to restore to the said defendants Ritch, Bulkley and Vaughan, or the persons, if any, entitled to receive the same, all sums paid to said Lucy Fayerweather or her attorney, together with interest thereon from the dates of payment, under or pursuant to the said settlement or agreement aforesaid, or otherwise to allow or account for the same according to

equity, in case it shall be adjudged in this action that they are not entitled to retain the same.

Fifteenth.—These defendants, Mary W. Achter and Emma S. Fayerweather, each for herself, does hereby offer to restore to said defendants Ritch, Bulkley and Vaughan, or to the persons, if any, entitled to receive the same, all sums paid to her or her attorney, together with interest thereon from the dates of payment, under or pursuant to the said settlement or agreement aforesaid, or otherwise to allow or to account for the same according to equity, in case it shall be adjudged in this ac-
115 tion that she is not entitled to retain the same.

II.

For further answer to said complaint, these defendants deny that they have any knowledge or information of the allegations thereof sufficient to form a belief, except as hereinbefore stated.

It is not intended by anything in this answer contained to deny or dispute the right of the colleges named in the ninth clause of said will to an equal division among themselves of the entire difference between one full half part of the estate of said Daniel B. Fayerweather remaining after the payment of his debts and the aggregate
116 of all the specific devises and bequests made by said will and codicils to benevolent, charitable, literary, scientific, religious or missionary societies, associations or corporations, including the $100,000 to said Northwestern University, at Evanston, Illinois, as aforesaid, provided said aggregate does not exceed said one-half; but these defendants claim that, under and pursuant to the laws of the State of New York, the widow and heirs at law and next of kin of said Daniel B. Fayerweather, deceased, are entitled to the excess of said aggregate, if any, over such one-half, and also to so much of said residuary estate as may exceed said one-half so computed.

Wherefore these defendants pray for judgment in this action as follows:

1st. That it be adjudged that the devises and bequests of the residuary estate of Daniel B. Fayerweather contained in said first and last codicils are fraudulent and void.

2d. That it be adjudged and decreed that all the residuary estate left by said Daniel B. Fayerweather and devised and bequeathed to the defendants Thomas G. Ritch,
Justus L. Bulkley and Henry B. Vaughan, as here-
117 inbefore set forth, was given to and received by
them in trust for the plaintiffs and the other institutions named in the ninth paragraph of said will for the purpose of carrying out the intentions of said testator as expressed in the tenth paragraph of said will, except as modified by the private memoranda hereinbefore set forth; but that, under the laws of the State of New York, said devise and bequest and trust is only valid to the extent of so much of said residuary estate as added to the aggregate of all the devises and bequests made in said will and codicils to benevolent, charitable, literary, scientific, religious or missionary societies, associations, or corporations, including the $100,000 for the North-
western University of Evanston, Illinois, mentioned
118 in said private memoranda, shall make one full half
part of the estate of said testator, after the payment of his debts, and no more; and that, as to the remainder of said residuary estate, except that part thereof heretofore actually paid out by said Ritch, Bulkley and Vaughan, as stated in the fifth paragraph of the complaint herein, and except that part thereof necessary to provide for the payments to E. M. Upham and Anner Amelia Reynolds, undertaken by said defendants, as in said paragraph set forth, the said Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan received and held the same, and now hold the same as trustees and in trust for the said Lucy Fayerweather, widow, and since her death, for the said

executors of her will and codicil, to the extent of the full one-half part thereof, due allowance being made for the sums paid to her and her attorney for said fraudulent settlement and release, and as trustees and in trust for the said Mary W. Achter and Emma S. Fayerweather, to the extent of the full one-sixth part thereof for each of them, due allowance being made for the sums paid to each of them or their attorneys respectively for said fraudulent settlement and release.

3d. That it be adjudged that the said settlements and releases made with or obtained from the said Lucy Fayerweather, Mary W. Achter and Emma S. Fayerweather, respectively, were and are each fraudulent and void,
119 and that the same be set aside, upon such terms as may be just and equitable, and that the sums paid for the same to said releasors or their attorneys, respectively, with the interest thereon, including the increased payments to said Lucy Fayerweather on her annuity, be charged against or allowed upon the sums payable to them respectively under the judgment herein, or be otherwise provided or accounted for as may be according to equity.

4th. That it be adjudged that the said deed of gift, dated February 24th, 1890 (Exhibit F), was and is fraudulent and void, and that the said Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan be enjoined
120 and restrained from further distributing the said residuary estate, or any part thereof, under the same, except to continue the payment of the said annuity to said Anner Amelia Reynolds, as aforesaid.

5th. That the said defendants Ritch, Bulkley and Vaughan, may be required to account for the moneys and property received by them from the estate of the said Daniel B. Fayerweather under said last will and testament and codicils or otherwise, and for the application thereof, and to pay over the said moneys and property

remaining in their hands among the parties to this action according to their several and respective rights thereto, as the same may be adjudged in this action.

6th. That the ultimate rights of the parties to this action in the estate of the said Daniel B. Fayerweather be determined and enforced by the judgment in this action, in accordance with the allegations of this answer and the foregoing prayers for relief therein.

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7th. That these defendants may have such other and further relief herein as may be just and equitable, with their costs herein, to be paid as the Court may direct.

WILLIAM BLAIKIE,
Attorney for said Defendants,
206 Broadway,
New York.

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City and County of New York, ss.:

JOHN B. REYNOLDS, being duly sworn, says:

That he is one of the executors of the last will and testament and codicil of the late Lucy Fayerweather, and as such is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOHN B. REYNOLDS.

Sworn to before me, this
16th day of August, 1893.

A. LANSING BAIRD,
Notary Public,
N. Y. Co.

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124

SUPREME COURT.

CITY AND COUNTY OF NEW YORK.

THE TRUSTEES OF AMHERST COLLEGE and others

against

THOMAS G. RITCH and others.

Decision.

125

This case having come on for trial before me at a Special Term of the Supreme Court, held in the City of New York, on the day of , 1894, now, after hearing the proofs and counsel of the respective parties, the Court makes and files its decision as follows:

The grounds upon which the issues have been decided are that the defendants Thomas G. Ritch and Henry B. Vaughan for themselves and on the part of Justus L. Bulkley, promised Daniel B. Fayerweather, now deceased, and induced him to believe, that if he would make them and the defendant Justus L. Bulkley residuary legatees of his estate, as provided in the codicils
126 to his will, dated December 13, 1884, and November 15, 1890, the said residuary legatees would sell and convert said residuary estate into cash and divide the same equally, share and share alike, among the twenty corporations mentioned in the ninth paragraph of the said Daniel B. Fayerweather's will, dated October 6, 1884, including the plaintiffs, after paying $100,000 to the Northwestern University, and that the said Daniel B. Fayer-

weather made the said Ritch, Bulkley and Vaughan his residuary legatees in and by the said codicils in reliance upon the said promises and inducements, and died leaving the said Ritch, Bulkley and Vaughan his residuary legatees in the belief so induced by them that they would sell, convert and distribute the residuary estate as aforesaid, and that the said Ritch, Bulkley and Vaughan have attempted to dispose of the said residuary estate in violation and disregard of the said premises.

And the Court does hereby direct that judgment be entered upon the issues of this action that the residuary estate devised and bequeathed to the defendants Ritch, Bulkley and Vaughan by the said last will and testa-
ment and codicils of Daniel B. Fayerweather, de-
127 ceased, was received and is held by them in trust for
the plaintiffs herein and the several institutions named in the ninth paragraph of the said will, and for the Northwestern University in the sum of $100,000; that the said residuary estate, except that part thereof necessary to provide for the payments mentioned in the third paragraph of the plaintiff's prayer for relief, was received and is now held by the said defendants in trust to sell and convert the same into cash, and to divide the same, giving to the Northwestern University $100,000 with its just and equitable proportion of the income, earnings and interest accrued upon the trust fund as between it and the institutions named in the ninth clause of the will,
and the said several corporations mentioned in the
128 ninth paragraph of said will the remainder thereof,
share and share alike. That the said defendants be enjoined from distributing the residuary estate or any part thereof under the deed of gift mentioned in and annexed to the complaint. That they account for all moneys and property which they have received or to which they became entitled as such residuary legates before Charles W. Dayton, Esq., Referee, to take and state the accounts. That the plaintiffs recover from the defendants Ritch, Bulkley and Vaughan, as trustees, the

costs of this action to be taxed, and to be paid out of the trust fund.

CHARLES H. TRUAX, J.

HENRY D. PURROY,
Clerk.

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130

At a Special Term of the Supreme Court of the State of New York, held at the County Court House in the City of New York, on the 28th day of December, 1894.

Present:—Hon. Charles H. Truax, Justice.

The Trustees of Amherst College, The Trustees of Dartmouth College, Hamilton College, The
131 University of Rochester, the President and Trustees of Williams College,

Plaintiffs,

against

Thomas G. Ritch, Justus L. Bulkley, and Henry B. Vaughan, individually and as Trustees and Executors of the Last Will and Testament and Codicils thereto, of Daniel B. Fayerweather, deceased; Bowdoin College, The Union Theological Seminary in the City of New York, Cornell University, Lin-
132 coln University, The Rector and Visitors of the University of Virginia, The Hampton Normal and Agricultural Institute, The Adelbert College of the Western Reserve University, Park College, John B. Reynolds and Morris B. Beardsley, as Executors of the Last Will and Codicil of Lucy Fayerweather, deceased; Mary W. Achter, Emma S. Fayerweather, Lucy J. Beardsley, Anner Amelia Reynolds, North Western University, the Mt. Sinai Hospital, The Presbyterian Hospital in the City of New York, The Woman's Hospital in the State of New York, The Manhattan Eye and Ear Hospital, The New York Eye and Ear Infirmary, The Manhattan Dispensary in the City of New York,

The Montefiore Home for Chronic Invalids, The Methodist Episcopal Hospital in the City of Brooklyn, New York; St. Luke's Hospital in the City of New York, The New York Cancer Hospital, The St. Vincent Hospital in the City of New York, The Trustees of Union College in the Town of Schenectady, in the State of New York; Haverford College, at Haverford College Post Office, Montgomery County, Penn.; The University of the City of New York, The University of Pennsylvania, The Brown University of Providence, R. I.; The President and Fellows of Harvard Univer-
133 sity, Wesleyan University at Middletown, Conn.; Princeton College at New Brunswick, N. J.; Wells College at Aurora, New York; Elmira Female College, Rutgers College, Vassar College, Poughkeepsie, New York; Barnard College, the Peter Cooper Union for the Advancement of Science and Art, The Shattuck School at Faribault, Minnesota; Lafayette College at Easton, Pa.; Maryville College, Trinity College at Hartford, Conn.; Wabash College, Marietta College, The President and Fellows of Yale College in New Haven, Conn.; The Trustees of Columbia College in the City of New York,

DEFENDANTS.

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This cause having come on for trial at a Special Term of this Court, held at the City of New York on the day of March, 1894, and the plaintiffs appearing by Messrs. Putney & Bishop, their attorneys; and the defendant Thomas G. Ritch appearing by Messrs. Arnoux, Ritch & Woodford, his attorneys; the defendants Justus L. Bulkley and Henry B. Vaughan by Messrs. Parsons, Shepard & Ogden, their attorneys; the defendants John B. Reynolds and Morris B. Beardsley, as executors of the last will and codicil of Lucy Fayerweather, deceased, and Mary W. Achter, Emma S. Fayerweather, by William

Blaikie, Esq., their attorney; the defendants the President and Fellows of Yale College, in New Haven, Connecticut, and Rutgers College appearing by Haley Fiske, Esq., their attorney; the defendant the Trustees of Columbia College, in the City of New York, appearing by John McL. Nash, Esq., its attorney; the defendant the Rector and Visitors of the University of Virginia, appearing by Robert C. Taylor, Esq., its attorney; the defendant University of Pennsylvania and Haverford College, appearing by Messrs. Robinson, Biddle & Ward, their attorneys; the defendant the Trustees of Union College, in the Town of Schenectady, in the State of
135 New York, appearing by Messrs. Chandler, Mussell & Philip, their attorneys; the defendant The New York Eye and Ear Infirmary, appearing by Messrs. Owen, Gray & Sturgis, its attorneys; the defendant The Shattuck School, appearing by John H. McArthur, its attorney; the defendant Wells College appearing by Messrs. Underwood & Storke, its attorneys; the defendant Vassar College, appearing by Robert E. Taylor, its attorney; the defendant The Manhattan Hegemony, appearing by its attorneys, Messrs. Thornton, Earle & Kimelle; the defendant The Montefiore Home for Chronic Invalids, appearing by Messrs. Julius J. & A. Lyon, its attorneys; the defendant The Manhattan Eye and Ear Hospital, appearing by
Messrs. Powel & Krugel, its attorneys; the defendant
136 The Northwestern University, appearing by Messrs. Rehbling & Kiddle, its attorneys; the defendant Lafayette College, appearing by Wagoo Swayne, Esq., its attorney; Wesleyan University, appearing by Messrs. George G. & F. Reynolds, its attorneys; the defendant Lincoln University, appearing by Hendrickson, Byrne & Taylor, its attorneys; the defendant the President and Trustees of Bowdoin College, sued as Bowdoin College, appearing by Messrs. Butler, Stillman & Hubbard, its attorneys; the defendant Park College, appearing by Clark Brooks, Esq., its attorney; the defendants Maryville College and Wabash College, appearing by Messrs. Parsons, Shepard & Ogden, its

attorneys; the defendant The Union Theological Seminary, appearing by Messrs. Adams & Comstock, its attorneys; the defendant Amherst College, appearing by Messrs. Scott & Tyson, its attorneys; the defendants Hobart College and Cornell University, appearing by Messrs. Arnoux, Birch & Woodford, their attorneys; the defendant Trinity College, appearing by Messrs. Lockwood & Hill, its attorneys; the defendants The New York Cancer Hospital and the Force Corps Union for the Advancement of Science and Art, appearing by John H. Percy, Esq., their attorney; the defendant the Methodist Episcopal Hospital, appearing by George S. Ingraham, Esq., its attorney; the defendant The University of the City of New York, appearing by Messrs. Brister, Peet & Opdyke, its attorneys; the defendant the Presbyterian Hospital, appearing by Messrs. DeForest Brothers, its attorneys; the defendant the Mount Sinai Hospital, appearing by Messrs. Bentley, Lauterbach & Johnson, its attorneys; the Trustees of the College of New Jersey at Princeton, appearing by Messrs. Alexander & Green, its attorneys; the defendant the President and Fellows of Harvard University appearing by Messrs. Evarts, Choate & Beaman, its attorneys; the defendant The St. Vincent's Hospital, appearing by Messrs. Miller & Wells, its attorneys; the defendant St. Luke's Hospital, appearing by Wm. B. McVickar, Esq., its attorney; the defendant The Hampton Normal and Agricultural Institution by Austin Abbott, Esq., its attorney; the defendant Elmira Female College appearing by Messrs. Arnoux, Birch & Woodford, its attorneys; the defendant Barnard College appearing by Messrs. Brownell & Lathrop, its attorneys; the defendant The Women's Hospital appearing by Messrs. Boggis & Tallon, its attorneys; the defendant Brown University, appearing by Boggis & Tallon, its attorneys; James Austin Reynolds by Byam L. Winton, his attorney.

Now, on reading and filing the pleadings of the respective parties, and the proofs on behalf of the respective parties having been taken and due deliberation having

been had, and a decision having been duly made and filed,

It is adjudged and decreed as follows:

First.—That the residuary estate devised and bequeathed to the defendants Thomas G. Ritch, Justus L. Bulkley and Henry P. Vaughan by the last will and testament and codicils of Daniel B. Fayerweather, deceased, is held in trust by them for the plaintiffs herein, to wit.: The Trustees of Amherst College, the Trustees of Dartmouth College, the Trustees of Hamilton College, the University of Rochester, the President and Trustees of Wil-
139 liams College and for the other institutions named in the ninth paragraph of the said will, to wit.: The President and Trustees of Bowdoin College, sued as Bowdoin College; Wesleyan University, the President and Fellows of Yale College, the Trustees of Columbia College in the City of New York, the Union Theological Seminary in the City of New York, Cornell University, Lafayette College, Lincoln University, the Rector and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, Maryville College, Marietta College, the Adelbert College of the Western Reserve University, sued as Adelbert College; Wabash College and Park College, and for the Northwestern University, upon the trusts herein stated.

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Second.—That the said residuary estate is so held by the said defendants in trust, to sell and convert the same into cash and to divide the same, except that part thereof necessary to provide for the payments mentioned in the third paragraph of the plaintiffs' prayer for relief in the complaint herein, as follows: To the Northwestern University; $100,000, with its just and equitable proportion of the income, earnings and interest accrued upon the trust fund as between it and the institutions named in the ninth clause of the will; and to each of the said plaintiffs and to each of the defendants above named, as mentioned

in the ninth paragraph of the said will, the remainder thereof, in equal parts.

Third.—That the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, and each of them, their attorneys, agents and servants be, and they are hereby, restrained and enjoined from distributing the said residuary estate, or any part thereof, under the deed of gift mentioned in, and annexed to the complaint, or otherwise, except as hereby directed.

Fourth.—That the defendants Thomas G. Ritch, Jus-
141 tus L. Bulkley and Henry B. Vaughan account for all moneys and property which they have received, or to which they became entitled, as such residuary legatees under the last will and testament and codicils of the said Daniel B. Fayerweather, deceased, before Charles W. Dayton, Esq., who is hereby appointed Referee to take and state such accounts.

Fifth.—That out of the sums in the hands of the said defendants, Ritch, Bulkley and Vaughan, or for which they are found to be accountable as such residuary legatees, they pay the sum of $100,000 to the Northwestern University, with its just and equitable proportion of the income, earnings and interest accrued upon the trust
142 fund as between it and the institutions named in the ninth clause of the will, and pay over the remainder one-twentieth part thereof to the plaintiff Trustees of Amherst College, one-twentieth part thereof to the plaintiff Trustees of Hamilton College, one-twentieth part thereof to the plaintiff The President and Trustees of Williams College, one-twentieth part thereof to the plaintiff The Trustees of Dartmouth College and one-twentieth part thereof to the University of Rochester, and one-twentieth part thereof to each of the defendants named in the ninth artiticle of the said will, to wit.: The President and Trustees of Bowdoin College, Wesleyan University, the President and Fellows of Yale College, the Trustees of Columbia

College, in the City of New York; the Union Theological Seminary in the City of New York, Cornell University, Lafayette College, Lincoln University, the Rectors and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, Maryville College, Marietta College, The Adelbert College of the Western Reersve University, Wabash College and Park College.

Sixth.—That the plaintiffs recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, as trustees, the costs of this action to be taxed and inserted herein, amounting to five hundred and
143 forty $\frac{94}{100}$ dollars, together with the sum of $2,000 as an extra allowance, which is hereby allowed to the plaintiffs, amounting in all to twenty-five hundred and forty $\frac{94}{100}$ dollars, to be paid out of the trust fund, for which judgment is given.

Seventh.—That the defendants John B. Reynolds and Morris B. Beardslsy, as executors, and Mary W. Achter and Emma S. Fayerweather, recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, as trustees, their costs to be taxed, together with the sum of $900, as an extra allowance to be paid out of the trust fund, and that the defendant The Northwestern Univserity recover from the defendants
144 Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, as trustees, to be paid out of the trust fund, its costs to be taxed and the sum of $100 as an extra allowance; and that the defendant Barnard College recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, as trustees, to be paid out of the trust fund, its costs to be taxed and the sum of $1,000 as an extra allowance allowed specifically for the services of Stephen P. Nash, Esq., as counsel for said defendant, and the other defendants similarly situated.

Enter,

HENRY D. PURROY, C. H. T.
Clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
145 Complainants,

against

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually and as Trustees and Executors of the Last Will and Testament of DANIEL B. FAYERWEATHER, deceased, and others.

Demurrer to Bill.

146

The demurrer of the above named defendants Justus L. Bulkley and Henry B. Vaughan, individually and in all capacities in which they are sued herein, to the bill of complaint of the above named plaintiffs.

These defendants and each of them, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, do demur to the said bill, and for causes of demurrer show:

1. That it appears by the plaintiffs' own showing by the said bill that they are not entitled to the relief prayed

thereby against these defendants, and that the said bill does not state facts sufficient to constitute a cause of action.

2. That it appears upon the face of the said bill that this Court has not jurisdiction of the subject of the action.

3. That the said bill is exhibited against these defendants, and against several other defendants to the said bill, for several and distinct and independent matters and causes which have no relation to each other, and in
147 which, or the greater part of which, these defendants are in no way interested or concerned, and ought not to be implicated.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto. And they pray the judgment of this Honorable Court whether they shall be compelled to make any answer to the said bill, and they humbly pray to be hence dismissed, with their reasonable costs, in this behalf sustained.

PARSONS, SHEPARD & OGDEN,
148 Solicitors and of Counsel for Defendants,
Bulkley and Vaughan,
111 Broadway,
New York City.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JNO. E. PARSONS,
Of Counsel for Defendants,
Bulkley and Vaughan.

New York City, October 1, 1897.

State of New York,
City and County of New York,
Southern District of New York, } ss.:

Justus L. Bulkley and Henry B. Vaughan, being duly and severally sworn, each for himself, deposes and says: I am one of the above named defendants. The foregoing demurrer is not interposed for delay.

Justus L. Bulkley,
H. B. Vaughan.

149

Sworn to before me this 4th day of October, 1897.

William E. Carnochan,
[seal] Notary Public (159),
N. Y. Co.

150

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Complainants,

against

THOMAS G. RITCH, individually and as Executor and Trustee of the Last Will and Testament of DANIEL B. FAYERWEATHER, deceased, *et al.*
Defendants.

Demurrer to Bill In Equity.

151

The demurrer of Thomas G. Ritch, individually and
152 as executor and trustee aforesaid, to the bill of complaint of the above named plaintiffs.

The said defendant by protestation, not confessing or acknowledging all or any of the matters or things in the said complaint contained to be true, in such manner and form as the same are therein set forth and alleged, doth demur to the said bill. And for causes of demurrer showeth that the following appears by the plaintiffs' own showing by said complaint:

1. That the said plaintiffs are not entitled to any of the relief against this defendant prayed in the said bill, and the complaint does not state facts sufficient to constitute a cause of action.

2. That in an action between all the parties hereto, brought in the State courts of the State of New York, these complainants have demanded the relief prayed for herein, and that said action is either unconcluded and now pending, or has been concluded and decided adversely to these complainants.

3. That the courts of the State of New York have proper jurisdiction of this action, and that this Court has not jurisdiction thereof.

4. That the plaintiffs' remedy, if any, has been
153 barred by their laches.

5. That the said bill is exhibited against this defendant and against several other defendants for several and distinct and independent matters and causes, which have no relation to each other, and in which and the greater part of which this defendant is in no way interested or concerned, and ought not to be impleaded.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant demurs thereto, and he prays the judgment of this Honorable Court whether he shall be compelled to make any answer to the said bill, and he prays to be hence dismissed
154 with his reasonable costs in this behalf sustained.

RITCH, WOODFORD, BOVEE & WALLACE,
Solicitors for said Defendant
Thomas G. Ritch,
Office and Post Office Address,
18 Wall Street,
New York City.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

Dated New York, October 1, 1897.

C. N. Bovee, Jr.,
Of Counsel for Defendant
Thomas G. Ritch.

155

State of New York,
City and County of New York, } ss.:
Southern District of New York.

Thomas G. Ritch, being duly sworn, deposes and says: That he is the defendant above named; that the foregoing demurrer is not interposed for delay.

Thomas G. Ritch.

Sworn to before me this 1st day of October 1897.

156

John McG. Goodale,
[seal] Notary Public (54),
New York County.

IN THE CIRCUIT COURT OF THE UNITED STATES.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Demurrer to Bill.

In Equity.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
157

Complainants,

AGAINST.

THOMAS G. RITCH, JUSTUS L. BULKLEY, and HENRY B. VAUGHAN, individually and as Trustees and Executors of the Last Will and Testament of Daniel B. Fayerweather, deceased; and of the Codicils thereto; The Trustees of Amherst College, The Trustees of Dartmouth College, The Trustees of Hamilton College, The University of Rochester, The President and Trustees of Williams College, The Presi-
158 dent and Trustees of Bowdoin College, The Union Theological Seminary in the City of New York, Cornell University, Lincoln University, The Rector and Visitors of the University of Virginia, The Hampton Normal and Agricultural Institution, The Adelbert College of the Western Reserve University, Park College, John B. Reynolds, as sole Executor of the Last Will and Codicil of Lucy Fayerweather, deceased; Lucy J. Beardsley, Anner Amelia Reynolds, North Western University, The Mt. Sinai Hospital, The Presbyterian Hospital in the City of New York, The Woman's Hospital in the State of New York, The Manhattan Eye and Ear Hospital, The New York Eye and Ear Infirm-

ary, The Manhattan Dispensary in the City of New York, The Montefiore Home for Chronic Invailds, The Methodist Episcopal Hospital in the City of Brooklyn, New York; St. Luke's Hospital in the City of New York, The New York Cancer Hospital, The Society of St. Vincent de Paul in the City of New York, The Trustees of Union College in the Town of Schenectady, in the State of New York; Haverford College, at Haverford College Post
159 Office, Montgomery County, Penn.; The University of the City of New York, The University of Pennsylvania, The Brown University of Providence, R. I.; The President and Fellows of Harvard University, Wesleyan University at Middletown, Conn.; Princeton College at New Brunswick, N. J.; Wells College at Aurora, New York; Elmira Female College, Rutgers College, Vassar College, Poughkeepsie, New York; Barnard College, the Peter Cooper Union for the Advancement of Science and Art, The Shattuck School at Faribault, Minnesota; Lafayette College at Easton, Pa.; Maryville College, Trinity College at Hartford, Conn.; Wabash College, Marietta
160 College, The President and Fellows of Yale College in New Haven, Conn.; and The Trustees of Columbia College in the City of New York,

DEFENDANTS.

The defendant The Union Theological Seminary in the City of New York, by protestation, not confessing or acknowledging all or any of the matters or things in the said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer shows:

I.—That the said plaintiffs have not in and by said bill made or stated such a cause as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for from or against these defendants.

2. That it does not appear from the bill that the matter in question or controversy is of such a judicial nature as to authorize this Court to take cognizance of it.

3. That this Court has not jurisdiction to grant relief prayed for in the bill of complaint.

Wherefore, these defendants demand the judgment of this Honorable Court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters or things therein contained, and pray to be hence dismissed with their reasonable costs in this
161 behalf sustained.

ADAMS & COMSTOCK,
Solicitors for Union Theological
Seminary.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.
Dated New York, October 1, 1897.

THATCHER M. ADAMS,
Of Counsel.

162

State of New York,
City and County of New York, } ss.:
Southern District of New York.

Ezra M. Kinsley, being sworn, deposes and says: I am the Treasurer of the Union Theological Seminary in the City of New York, one of the above named defendants.

The above demurrer is not interposed for delay.

E. M. Kinsley.

1st

Sworn to before me this 6th day of October, 1897.

N. F. Sayer,
Notary Public,
N. Y. Co.

The following defendant Colleges, namely: Yale, Harvard, Cornell, Rochester, Lafayette, Columbia, Amherst, Williams, Dartmouth and Adelbert, also interposed demurrers in like form to those above.

1st

[illegible]

[illegible]

[illegible]

widow and these next of kin, and a will and codicils devising and bequeathing the residue of his estate, after several specific bequests, to these defendants; and leaving writings separate from the will, by which the defendants were to pay over the residue to numerous colleges and charitable institutions; that the will and codicils have been proved and established; that the devise or bequest of more than one-half his estate to such institutions was within the prohibition of this law of the State of New York; that the shares of next of kin in residue of the half as so attempted to be disposed of, after lawful devises and bequests, belonged to the plaintiffs; that by conceal-
167 ment and misrepresentation of these defendants the plaintiffs were induced to release their interests in the estate; that a suit has been had in the Courts of the State in which their shares with the rest of this residue of the estate have been decreed to the colleges and charitable institutions, notwithstanding the fraud in procuring these releases; and that this judgment is inoperative against them because this issue of fraud was not there tried, and because the proceedings which were had did not constitute due process of law.

As by that law the devise or bequest would "be valid to the extent of one-half and no more" of the estate, it would seem to be apparent that, but for the releases, the plaintifis would be entitled to their shares respectively
168 in the residue of the half of the estate remaining in the hands of these defendants as executors or trustees so undisposed of, and that if the releases are void, and have so been from the beginning for the fraud and concealment alleged in procuring them that the plaintiffs are still entitled to their shares in this residue of the estate; and they still have a right to proceed for the recovery of their shares in this Court, as citizens of a different State from the defendants, and to have the issue as to the validity of the releases tried here, if it has not been tried and determined at all, or by due process of law, elsewhere. So the question made on this demurrer is whether the proceedings in the

State Court, as set forth, amount in view of the allegations of the bill in respect to them, to an adjudication that is final and conclusive as to the existence and force of the releases.

The suit appears to have been commenced in a Supreme Court of the State by the Trustees of Amherst College, and those of two other colleges against these defendants Ritch, Bulkley and Vaughan as executors and trustees, and against these plaintiffs, among others as claimants, and to have ended in the Court of Appeals. The proceedings through a Special Term are made a part of the bill; the rest are left to appear as set forth by allega-
169 tion. The complaint after alleging the will, the codicils, the probate, and the writings by which the defendants would be bound to pay over to those and other colleges the residue of the estate, further alleged that the plaintiffs here "claim to have some interest in the said residuary estate as next of kin," and prayed that it be adjudged and decreed that all of said residuary estate devised and bequeathed to the defendants Ritch, Bulkley and Vaughan as executors and trustees, except the particular bequests, was then held by these defendants in trust for those plaintiffs there and the several institutions mentioned, and further, that the ultimate rights of those plaintiffs should be determined by the judgment in the action, in accordance with the allegations of the com-
170 plaint. The plaintiffs here appeared as defendants there, and set up the fraudulent obtaining of the releases, and alleged that they were not bound thereby, and prayed that the defendants Ritch, Bulkley and Vaughan, as executors and trustees, might be required to account to them for their shares in the residue of the estate after paying over the specific bequest,

When what is decided in one cause becomes material to be ascertained in another, it may be set forth and shown by allegations and proofs *de hors* the record, which are not contrary to nor inconsistent with the record (Miles *vs.* Campbell, 2 Wall., 102). And upon this demurrer the allegations of the bill are to be taken as true when not

contrary to, nor inconsistent with, the record of the proceedings as set up. The cause appears from the proceedings to have come on to be heard before the Court at Special Term, and as to the decision there the bill alleges: "And said Court thereupon made and rendered its decision without considering, passing upon or including in judgment the said issues, and omitted to decide upon these complainants' right to the affirmative relief by said answer prayed in respect to said releases." The decision filed was this:

"The grounds upon which the issues have been de-
171 cided are that the defendants Thomas G. Ritch and Henry B. Vaughan, for themselves and on the part of Justus L. Bulkley, promised Daniel B. Fayerweather, now deceased, and induced him to believe, that if he would make them and the defendant Justus L. Bulkley residuary legatees of his estate, as provided in the codicil to his will, dated December 13, 1884, and November 15, 1890, the said residuary legatees would sell and convert said residuary estate into cash and divide the same equally, share and share alike, among the twenty corporations mentioned in the ninth paragraph of the said Daniel B. Fayerweather's will, dated October 6, 1884, including the plaintiffs, after paying $100,000 to the Northwestern Uni-
versity; and that the said Daniel B. Fayerweather
172 made the said Ritch, Bulkey and Vaughan his residuary legatees in and by the said codicils in reliance upon the said promises and inducements, and died leaving the said Ritch, Bulkley and Vaughan his residuary legatees, in the belief so induced by them that they would sell, convert and distribute the residuary estate as aforesaid, and that the said Ritch, Bulkley and Vaughan have attempted to dispose of the said residuary estate in violation and disregard of the said premises.

And the Court does hereby direct that judgment be entered upon the issue of this action that the residuary estate devised and bequeathed to the defendants Ritch, Bulkley and Vaughan by the said last will

and testament and codicils of Daniel B. Fayərwəather, deceased, was received and is held by them in trust for the plaintiffs herein and the several institutions named in the ninth paragraph of the said will, and for the Northwestern University in the sum of $100,000; that the said residuary estate, except that part thereof necessary to provide for the payments mentioned in the third paragraph of the plaintiffs' prayer for relief, was received and is now held by the said defendants in trust to sell and convert the same into cash, and to divide the same, giving to the Northwestern University $100,000, with its just and
equitable proportion of the income, earnings and in-
173 terest accrued upon the trust fund as between it and
the institutions named in the ninth clause of the will, and the said several corporations mentioned in the ninth paragraph of said will the remainder thereof, share and share alike."

The judgment or decree entered thereupon, after reciting the filing of the pleadings of the respective parties, the taking of proofs on their behalf and due deliberation thereon had, and that a decision had been duly made and filed decreeing the residue to the institutions mentioned, proceeded as to these plaintiffs:

"*Seventh.*—That the defendants John B. Reynolds
174 and Morris B. Beardsley, as executors, and Mary W.
Achter and Emma S. Fayerweather recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, as trustees, their costs to be taxed, together with the sum of $900 as an extra allowance to be paid out of the trust fund."

This judgment or decree indicates rather that these plaintiffs were dismissed with costs as not proper parties, than that the validity of the releases was at all passed upon; and the allegations of the bill do not appear to be contrary to nor inconsistent with it in this respect.

The bill alleges an appeal to the General Term of that

Supreme Court, and that the judgment at Special Term was there affirmed.

The Statute under which the case was tried at Special Term and the appeal had to the General Term appears to be Section 1022 of the Code of Civil Procedure of the State as amended by Chapter 688, Laws of 1894, which provided that:

"The decision of the Court, or the Report of a Referee, upon the trial of the whole issues of fact, may state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon; or the Court
175 or Referee in deciding the issues may file a decision stating concisely the grounds upon which such issues have been decided, and direct the judgment to be entered thereon, which decision so filed shall form a part of the judgment roll. In an action where the costs are in the discretion of the court, the decision or report must award or deny costs, and if it awards costs it must designate the party to whom the costs to be taxed are awarded. Whenever judgment is entered on a decision which does not state separately the facts found, the defeated party may file an exception to such decision, in which case, on an appeal from the judgment entered thereon upon a case containing exceptions, the General Term of the Court in which the action is pending shall review all questions
176 of fact and of law and may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to."

The bill further alleges in respect to the appeal that it was taken "to the General Term of said Supreme Court, sitting as a court for the correction of errors, and not exercising any original jurisdiction," without stating that the appeal was upon a case containing exceptions, and that the General Term held that the right of the parties to the property and estate did require the consideration of said issues, and that it became the duty of said Court

to require and order that said issues should be, in fact, considered passed upon and included in judgment by the trial court; and that

"Nevertheless said court at said General Term did not so require or order, but by various fictions of law imputed to said Trial Term and court below that it had determined said issues and had decided in favor of the plaintiffs in said action contrary to the truth and fact and thereupon pretended to adjudge and determine as such court for the correction of errors that there was not sufficient preponderance of evidence to support the asserted invalidity
177 of said releases to render such imputed determination of said Trial Court erroneous as matter of law, but that such imputed determination was supported by evidence sufficient to relieve the same from the assignment of error in so deciding."

"It was competent for said General Term to have exercised an original jurisdiction and to have adjudged said issues and thereupon to have modified said judgment so as to include the actual determination thereof; but said General Term did not exercise its power, but confined its action wholly to the consideration of errors in the record."

As the proceedings are not set out in the bill, nor brought forward by answer or otherwise, these allega-
178 tions so far as they are consistent with the law must also, on this demurrer, be taken to be true. The statute does not seem to require that an issue of fact in a case should be tried before decision unless the appeal is upon a case containing exceptions and this judgment may have been properly affirmed without trying the issue as to those releases and thereby room have been left under the law for the judgment or decree to have been rendered, and still these allegations be true.

The bill further alleges that on appeal the Court of Appeals affirmed this decision of the General Term upon matters of law merely, and did not try that issue. As to this Judge Vann said, Amherst Collegs *vs.* Ritch, 151 N.

Y., 382: "We are of the opinion, therefore, that where the decision of the Special Term does not state the facts found and the judgment entered thereon has been affirmed by the General Term, upon an appeal to this Court, all the facts warranted by the evidence and necessary to support the judgments below are presumed to have been found. Hence, upon such an appeal we have no more control over the facts than we have when specific findings are made by the Special Term and affirmed by the General Term. This conclusion takes the question as to the fraud alleged to have been practiced by the residuary legatees upon the widow and next of kin in procuring the re-
179 leases out of the case, for it cannot be said on the record before us that evidence tending to show fraud is so irresistible as to make the omission to find fraud an error of law."

As that case is made to appear from the allegations of the bill as admitted by the demurrer, the judgment or decree was entered without the issue as to the validity of the releases having been by either of the courts at any time, tried and determined, upon evidence, as a matter of fact.

That judgment or decree was not against these plaintiffs for the recovery of money or property, but was against Ritch, Bulkley and Vaughan for such a recovery of them, where the rights of the plaintiffs were only collateral;
180 and that recovery upon the case as made to appear, did not so necessarily involve the decision and determination of this collateral issue as such a recovery of money or property from these plaintiffs themselves would. A general finding and judgment against a party for the recovery of money or of property seems to draw into it and conclude all questions which might arise in determining the right of recovery against that party; but when an outside or collateral issue only is involved, to make the decision upon that conclusive, it should appear that this very question was involved and actually decided somewhere in the proceedings (Cromwell *vs.* County of Sac, 94 U. S. 351). Of course this Court cannot review the de-

cisions of any court of the State having concurrent jurisdiction, or otherwise having jurisdiction, on account of any supposed error or irregularity in the proceedings, or decision, or judgment. Accordingly it cannot with any propriety inquire into any of the proceedings in question otherwise than for the purpose of determining whether the issue raised in this case was tried there; or perhaps whether the proceedings there afforded opportunity by due process of law for the trial of the issue, if a trial was had.

An inspection of the proceedings, such as has been afforded and had and as they must be viewed on this
181 demurrer, fails entirely to show that the issue of fraud in the execution of the releases was by either of the Courts in which the proceedings were pending in any wise tried and determined. It does not appear to be claimed here that such issue is shown to have been tried in any other way than as the determination of the issues in favor of the plaintiffs there would draw into them the determination of all of the rights of these plaintiffs here, as they were made and became defendants there. It is said that the judgment was the same as if upon a general verdict against these plaintiffs; and that it involved the determination of those issues as to these plaintiffs here as defendants there, as well as against the defendants Ritch, Bulkley and Vaughan defendants there as ex-
182 ecutors and trustees. That suit was not, however, an interpleader by Ritch, Bulkley and Vaughan, according to the course of equity procedure, where the claimants would be brought in and required to litigate their claims between themselves respectively, but was for the recovery of property of those defendants only, and the rights of these plaintiffs were only collaterally involved as a defense excluding the rights of the plaintiffs there in the determination of the case against the defendants there of whom a recovery was sought. This issue only so involved would not seem to be conclusive upon the rights of the plaintiffs unless the proceedings should show clearly that it was in fact tried. As the proceedings in the

light of the allegations concerning them do not show, these plaintiffs do not appear now to be concluded by that judgment.

Again, the plaintiffs would not be so concluded unless they had an opportunity to try the issue upon which their rights depended in a proceeding which would amount, as instituted and carried forward, to due process of law. If the case had been tried, as it is alleged to have been tried, without allowing an answer by these plaintiffs setting forth their rights, and an opportunity to bring evidence to support it, probably no one would now claim that they

were concluded by the judgment, Hovey *ex.* Elliott,
183 167 U. S. 409. As the proceedings went forward, the

Special Term decided the case upon a ground which did not involve the determination of this issue of fraud in the procurement of the releases, and that court appears not to have in any way passed in any manner upon the question. The General Term is alleged to have decided the case upon other grounds without any finding upon that question and this allegation is admitted by the demurrer. The Court of Appeals appears merely to have affirmed the decision of the General Term upon matters of law only. This alleged course of proceeding, which must be taken to be that had, left these plaintiffs without any opportunity to have this question tried in either court.

If the course of procedure cut off the right to try
184 the question raised by the answer it would be as much

short of due process of law as the decision of a case involving such a question without allowing an answer would be.

Demurrer overruled; defendants to answer over by September rule day.

HOYT H. WHEELER.

ROGER M. SHERMAN,
For Plaintiffs.

WILLIAM BLAIKIE,
For defendant Reynolds, Executor of Lucy Fayerweather, deceased.

PUTNEY & BISHOP,
For Colleges, defendant.

RITCH, WOODFORD, BOVEE & WALLACE,
For Ritch, Executor.

JOHN E. PARSONS,
For Bulkley & Vaughan, Executors.
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186

AMENDED DECREE

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held in the United States Court Building, in the City of New York, on the 10th day of August, 1898.

187

Present: Hon. Hoyt H. Wheeler, Judge.

Emma S. Fayerweather and Mary W. Achter,
Complainants,
against
Thomas G. Ritch, individually Etc., and others,
188 Defendants.

Amended Decree.

The issues of law raised by the demurrers of the defendants, Thomas G. Ritch, Justus L. Bulkley, Henry B. Vaughan, Union Theological Seminary, Cornell University, Williams College, Rochester University, Amherst College, and Lafayette College, Marietta College, Adelbert College, the Trustees of Columbia College, the President and Fellows of Yale College, to the bill of complaint therein, having come on duly to be heard and counsel for the respective parties and due consideration having been had, and the Court having rendered its decision overruling the said demurrers, it is now on motion

of Roger M. Sherman, Solicitor for complainants.

ADJUDGED AND DECREED that each of said demurrers be and the same hereby is overruled, and that the defendants so demurring be, and they hereby are assigned to answer the bill on or before the next succeeding rule day, to wit.: the first Monday of September proximo, except said defendant, the President and Fellows of Yale College, and that said defendant is assigned to answer the bill on or before the first Monday of November, proximo; and to pay to the complainants the costs and disbursements of said demurrers.

189

HOYT H. WHEELER,
Judge.

190

UNITED STATES CIRCUIT COURT.

Southern District of New York.

Emma S. Fayerweather and another,

vs.

Thomas G. Ritch, and others

Opinion.

MOTION FOR PRELIMINARY INJUNCTION AND FOR

191 RECEIVER.

Lacombe, Circuit Judge.

In view of Judge Wheeler's opinion upon decision of the demurrers it must be assumed that there has been no adjudication in any court sufficient to constitute due process of law, as to the validity of the releases which complainants impeach as being obtained by fraud.

There is sufficient shown in the moving papers to warrant the Court in preserving the *status quo* until final hearing, but it would seem that this may be done sufficiently by injunction.

192

Complainants may take an order enjoining Ritch, Bulkley and Vaughan from paying over any more of the $600,000 in their hands, and such of the other defendants served as are residents of this district, or have appeared here either by notice of appearance generally or otherwise by actual appearance without reservation, from disposing of or otherwise encumbering the proceeds of any sums of money paid to them under the alleged

secret trust, until final hearing, or further order of this Court.

The present suit is not one to enforce any legal or equitable claim upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district; no specific real property or personal property is sought to be affected. It is not, therefore, within the saving clause of the Act of 1888 which preserves Section 38 of the Act of 1875.

The motion, therefore, of Lincoln University, a citizen and resident of Pennsylvania, to set aside service of subpœna is granted; and the injunction against Ritch,
193 Bulkley and Vaughan will except any payment to that particular corporation.

Motion for Receiver is denied.

August 29, 1898.

194

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held in the Post Office Building, in the City of New York, on the seventh day of September, 1898.

Present: HON. E. HENRY LACOMBE, Judge.

EMMA S. FAYERWEATHER and MARY W. ACHTER,

195 Complainants,

against

THOMAS G. RITCH, individually, Etc., and others,

Defendants.

Injunction.
In Equity.

A motion having come on duly to be heard, upon an order to show cause heretofore granted, and the papers therein recited in support thereof, and upon the affidavit of William B. Putney, verified August 10th, 1898; and upon the affidavits of Thomas G. Ritch, Henry B.
196 Vaughan, Justus L. Bulkley and C. N. Bovee, in opposition for an injunction and Receiver.

After hearing Roger M. Sherman, Esq., of counsel for complainants, and William Blaikie, Esq., of counsel for the defendant John B. Reynolds as executor of Lucy Fayerweather, deceased, in support of the motion; and John E. Parsons, Esq., of counsel for the defendants Henry B. Vaughan and Justus L. Bulkley, individually, and as trustees and executors of the last will and testament of Daniel B. Fayerweather, deceased, and of codicils thereto; C. N. Bovee, Esq., of counsel for the defendant Thomas G. Ritch, individually, and as executor

and trustee of said last will and codicils, Marietta College and Cornell University; William B. Putney, Esq., of counsel for the defendant the trustees of Amherst College, the trustees of Dartmouth College; the Union Theological Seminary, the Rectors and Visitors of the University of Virginia and the Lafayette College; Messrs. Root, Howard, Winthrop and Stimson, for the trustees of Hamilton College; Messrs. Butler, Notman, Joline and Mynderse, of counsel for Bowdoin College; Seth Sprague Terry, of counsel for the University of Rochester; Messrs. Putney and Bishop for the President and Trustees of Williams College; Messrs. Scott and Upson, of coun-
197 sel for Adelbert College of Western Reserve University; Messrs. Hornblower, Byrne and Taylor, counsel for the defendant Lincoln University; and John McLean Nash, Esq., solicitor for defendant the trustees of Columbia College in opposition;

And upon reading and filing proof of due service of said order to show cause upon the defendant Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, indidividually and as trustees and executors of the last will and testament and codicils thereto of Daniel B. Fayerweather, deceased; the President and Trustees of Bowdoin College, the Trustees of Amherst College, the Trustees of Dartmouth College, the Trustees of Hamilton College, the University of Rochester, the President
198 and Trustees of Williams College, the Union Theological Seminary in the City of New York, Cornell University, Lincoln University, the Rectors and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, the Adelbert College of the Western Reserve University, Park College, John B. Reynolds, as sole executor of the last will and testament and codicil of Lucy Fayerweather, deceased; Lucy J. Beardsley, Anner Amelia Reynolds, North Western University, the Mount Sinai Hospital, the Presbyterian Hospital in the City of New York, the Woman's Hospital in the State of New York, the Manhattan Eye and Ear Hospital, the New York Eye and Ear Infirmary, the Manhattan Dispensary

in the City of New York, the Montefiore Home for Chronic Invalids, the Methodist Episcopal Hospital in the City of Brooklyn, New York; the St. Luke's Hospital, the New York Cancer Hospital, the Society of St. Vincent de Paul in the City of New York, the Trustees of Union College in the Town of Schenectady, in the State of New York; Haverford College, at Haverford College Post Office, Montgomery County, Penn.; the University of the City of New York, the University of Pennsylvania, the Brown University of Providence, Rhode Island; the President and Fellows of Harvard University, the Wesleyan University at Middletown, Conn.; the Trustees of the
199 College of New Jersey at Princeton, New Jersey; Wells College at Aurora, New York; Elmira Female College, Rutgers College, at New Brunswick, N. J.; Vassar College, at Poughkeepsie, N. Y.; Barnard College, the Peter Cooper Union for the Advancement of Science and Art, the Shattuck School at Faribault, Minn.; Lafayette College at Easton, Pa.; Maryville College, Trinity College at Hartford, Conn.; Wabash College, Marietta College, the President and Fellows of Yale College in New Haven, Conn.; the Trustees of Columbia College in the City of New York, and the Wright Memorial Hospital in the City of New York;

It is, on motion of Roger M. Sherman, Esq., solicitor for complainants,

200 *ORDERED*, that the defendants the President and Trustees of Bowdoin College, the Trustees of Amherst College, the Trustees of Dartmouth College, the Trustees of Hamilton College, the University of Rochester, the President and Trustees of Williams College, the Union Theological Seminary in the City of New York, Cornell University, the Rectors and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, the Adelbert College of the Western Reserve University, Park College, Wesleyan University at Middletown, Conn.; Lafayette College at Easton, Penn.; Maryville College, Marietta College, Wabash College, the President and Fellows of Yale College in New Haven,

Conn., and the Trustees of Columbia College in the City of New York, be, are, and each of them is HEREBY ENJOINED AND RESTRAINED from disposing in any manner of any sums of money paid to them or to either of them, or to their officers, trustees, solicitors, attorneys, or agents, as and for a legacy or gift under, or proceeding from the alleged secret trust in, of or concerning the residuary estate of Daniel B. Fayerweather, deceased, asserted or established in, or pursuant to any suit, action, or proceeding heretofore brought, or maintained by, or between them or any of them, and the defendants Thomas G. Ritch, Henry B. Vaughan, Justus L. Bulkley and
201 others until final hearing of the suit; and until further order of this Court;

And that the defendant Thomas G. Ritch, Henry B. Vaughan, Justus L. Bulkley, individually, and as executors and trustees, and each of them, their bailees, depositaries, servants, agents, attorneys, and solicitors, be and they are hereby ENJOINED AND RESTRAINED from paying over to any of the defendants, their agents, attorneys or solicitors, and from expending in litigation, or by payment to their servants, agents, attorneys, counsel, solicitors, or to any other person or persons, upon any ground or claim whatever, any part of said residuary estate until final hearing in this suit; and until the further order of this Court.

202 Except always that this injunction shall neither enjoin nor restrain the defendants Ritch, Bulkley and Vaughan, and each of them, their bailees, depositaries, servants, agents, attorneys, and solicitors from making any payments to Lincoln University, its agents, attorneys or solicitors.

And it is further ordered that this motion for a receiver be, and the same hereby is denied.

September 15, 1898.

(Signed)
E. HENRY LACOMBE,
U. S. Circuit Judge.

A copy.
JOHN H. SHIELDS,
Clerk.

L. S.

Filed, September 16, 1898.

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204

FAYERWEATHER *vs.* RITCH, 91 Federal Reporter p. 724.

WALLACE, Circuit Judge.

"The theory of the present suit, as set forth in the bill, is that the complainants have never been heard upon the question of the validity of their releases; consequently, that the judgment of the state court is not a bar as to that question, and any adjudication to that effect by either of the state courts adversely to them is void, 205 as contrary to due process of law.

"By whatever process of reasoning the result was reached, it is plain that by the judgment of the state court it has been determined that the fund now in controversy equitably vested in the various corporations made legatees by the ninth clause of the will, and did not, as to any part of it, belong to the complainants; and that determination was reached in an action, between the same parties now present, brought to settle the ultimate rights of each to the fund. As the present suit is brought to determine the rights of the same parties to the same fund, we are unable to doubt that the former judgment is an estoppel and a finality, not only as to every matter which was offered and received to sustain or defeat 206 the respective claims of the parties to the fund, but also as to any other admissible matter which might have been offered for that purpose. It suffices to refer to Cromwell *vs.* Sac Co., 94 U. S. 351, as a complete exposition of the doctrine of estoppel, so far as pertinent to the present case. If the present complainants had omitted in the former action to assert the invalidity of their releases, the result would be the same. In Stout *vs.* Lye, 103 U. S. 66, pending a suit by a mortgagee to foreclose a mortgage, certain creditors of the mortgagor obtained a judgment against him, which became a lien upon the mortgaged premises. Subsequent to a decree in the foreclosure suit, they filed a bill against the mortgagee to set

aside the mortgage as illegal, or, alternatively, to have usurious interest payments applied to reduce the principal. The court held that, notwithstanding they were not actual parties to the foreclosure suit, they were parties by representation, through the mortgagor, and bound by the decree to the same extent as he was; and, although the mortgagor had not set up against the mortgage the claims asserted by them, they were estopped by the decree. The decision proceeded upon the principle that the claim in controversy had passed into judgment by a decree establishing the amount and validity of the mortgage, and concluded them as to 'any other admissible matter
207 which might have been offered' to defeat the mortgage. So, in this case, the claims from the respective parties to the fund in controversy have passed into judgment, and the rights of the parties cannot be relitigated upon the basis of any title which they had, but did not litigate. In Dowell *vs.* Applegate, 152 U. S. 327, 14 Sup. Ct. 611, in a suit by Dowell to subject lands of Applegate to sale in satisfaction of his claims, a decree in favor of the former was held to be final, as an estoppel, in a subsequent suit, involving the same land, brought by Applegate against Dowell, based upon a title which Applegate did not set up in the first suit. The grounds of the decision were that the fundamental question presented in the first suit was whether the lands could be right-
208 fully sold in satisfaction of Dewell's demands; that the decree was an adjudication, as between Dowell and the defendants in that suit, who asserted title to those lands, that no claim asserted by either of them could stand against the right of Dowell to have those lands sold; and the rule was applied that 'a judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented.' In this case the fundamental question in the former suit was whether the parties other than the present complainants, or the latter, were the equitable owners of the fund in controversy. Moreover, one of the issues presented for trial in

the former action was whether the releases given by the complainants were operative upon the rights or interests of the several parties in the fund. The plaintiff set them forth in the complaint as affecting the rights of the parties. The present complainants alleged in their answers that they were void, and evidence touching the circumstances of their execution was introduced. That issue was, consequently, in litigation. If the trial court had assumed to pass upon the question of the validity of the releases, and had decided it erroneously, either upon a misconception of the law or of the evidence, it is entirely plain that the adjudication, so long as unreversed, 209 would have been final, and that question could not have been reopened in any subsequent litigation between the same parties. The trial court held that the releases were without effect on the rights of the parties, and, even though that decision was erroneous, it was final between the parties until reversal; and if it be assumed that the opinions of the appellate courts should be treated as a reversal of that decision, and that both of these courts erroneously held the releases to be valid, these determinations are final between the parties upon that question. The complainants have had their day in court, before tribunals having jurisdiction to settle their rights, and, even if there has been a miscarriage of justice, they must submit. '*Interest reipublicas ut sit finis* 210 *litium*.'

"The proposition that their rights have been disposed of without due process of law is too preposterous to merit discussion. They have had a trial according to the settled course of judicial proceedings. They have been heard and heard *ad libitu*, though without avail.

"In granting the order for a preliminary injunction, the court below was mainly influenced by the decision of Judge Wheeler, rendered upon a demurrer to the complainants' bill. 88 Fed. 713. It is altogether probable that, if all the facts which appear in the present record had been before the learned judge who decided the de-

murrer, he would not have reached the conclusion that the former adjudication was not a bar to the present suit. However that may be, inasmuch as we are satisfied that the complainants cannot ultimately prevail upon the case made by their bill, we conclude that they are not entitled to preliminary relief.

"The order is accordingly reversed."

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212

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit held at the City of New York on the 18th day of January, 1898.

Present: { Hon. William J. Wallace, / Hon. Nathaniel Shipman. } Circuit Judges.

Emma S. Fayerweather and
213 Mary W. Achter,
Complainants—Appellees
vs.
The Trustees of Amherst College and others.
Defendants—Appellants.

Appeals having been taken from the order of injunction made by Hon. E. Henry Lacombe and entered in the office of the clerk of the United States Circuit Court for the Southern District of New York upon the 15th day of September, 1898, by the Trustees of Amherst College,
214 the President and Trustees of Williams College, Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, individually and as trustees and Executors of the last will and testament of Daniel B. Fayerweather deceased, Trustees of Bowdoin College, the Trustees of Columbia College in the City of New York, Lafayette College, and the return upon said appeal from the said Court having been duly filed, and the said appeal coming on to be heard; after hearing Mr. James L. Bishop of Counsel for the Trustees of Amherst College and others; Mr. C. N. Bovee for Mr. Thomas G. Ritch, Mr. John E. Parsons for Mr. Justus L. Bulkley, and Mr. Henry B. Vaughan, Mr. Howard B. Taylor for the Trustees of Columbia College, and Mr. Swayne for Lafayette University appellants;

and Mr. Roger M. Sherman for the complainants and Mr. William Blaikie for Mr. John B. Reynolds as executor of the last will and codicil of Lucy Fayerweather deceased, and Anner Amelia Reynolds, defendants–respondents, and due deliberation having been had, it is

ORDERED, ADJUDGED AND DECREED that the said injunction order appealed from be, and the same hereby is reversed, and the said injunction is dissolved, with costs to the appellants to be taxed. It is further

ORDERED that a mandate issue to the said Circuit Court in accordance with this decision.

215 W. J. W.
N. S.

216

Upon pages 109–175 of this volume, inclusive, the Answer of Northwestern University to the Amended Bill, and that to the Cross-Bill, were inadvertently printed.

Northwestern withdrew said Answers, and substituted Pleas, like those of Hamilton College.

Reference to said Pleas occurs in Volume I, pages 190, 306. This is why pages 109–175 are not here.

STATE OF ILLINOIS, } ss.
Cook County. }

I, Philip Knopp, County Clerk and Clerk of the County Court of Cook County, the same being a Court of Record, do hereby certify that Geo. H. Miller, whose name is subscribed to the annexed Jurat, was, at the time of signing the same, a Notary Public in Cook County, duly commissioned, sworn and acting as such, and authorized to administer oaths; that I am well acquainted with the handwriting of said Notary, and verily believe that the signature to the said Jurat is gen-
349 uine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Chicago, in the said County, this 23rd day of September, 1899.

CHARLES KNOPP,

[SEAL]. Clerk.

350

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

The Plea of Hamilton College and of those adopting it to the Amended Bill of Complaint.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
351 Complainants,
against
THOMAS G. RITCH, Justus L. Bulkley and Henry B. Vaughan, individually, and as Trustees and Executors of the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the codicils thereto, and others,
Defendants.

In Equity No. 6675.

The plea and answer of the Trustees of Hamilton College, defendant, to the bill of complaint of Emma S.
352 Fayerweather and Mary W. Achter, complainants.

This defendant by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged, do plead in bar to the bill herein and for plea do say as follows:

On or about the 26th day of June, 1893, the following

named corporations, defendants herein, and hereinafter referred to as the "Five Colleges," namely, The Trustees of Amherst College, The Trustees of Dartmouth College, The Trustees of Hamilton College, The University of Rochester and The President and Trustees of Williams College, brought in the Supreme Court of the State of New York, which court is a Court of Record in the said State, having general jurisdiction in law and equity, the action referred to in the said bill, the complaint wherein is thereto annexed. In that action the complainants herein, and, except the said Five Colleges, all the defendants herein were defendants. By their complaint in
353 the said action the said Five Colleges alleged and prayed that by the said Supreme Court it might be adjudged and decreed, that the entire residuary estate of the said Daniel B. Fayerweather, deceased, was devised and bequeathed to the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan in trust for, and to distribute the same to and among the said Five Colleges and certain other educational corporations which are mentioned in the ninth paragraph of the will of the said Daniel B. Fayerweather, and are defendants herein; and in and by the said complaint the said Five Colleges further alleged, and prayed that by the said Court it might be adjudged and decreed, that the said residuary estate belonged to them and to the said other educational
354 corporations, and that they and the said corporations were entitled to receive the same and the whole of the same from these defendants and from the defendant Thomas G. Ritch.

And the said Five Colleges in and by the said complaint further prayed as follows:

"That the said defendants, Ritch, Bulkley and Vaughan may be required to account for the moneys received by them under said last will and testament and codicils, and that they may be required to apply so much thereof as they may have received upon the trusts hereinbefore stated to the purposes of said trust.

That the ultimate rights of the plaintiffs, as between them and each of them, and every of the other defendants herein, be determined by the judgment in this action, in accordance with the allegations of this complaint and the prayer hereinbefore contained."

The complainants herein, by their duly authorized attorney, learned in the law, duly appeared in the said action and served and filed an answer to the said complaint. In and by the said answer the said complainants alleged, and prayed that by the said Supreme Court it might be
adjudged and decreed, that the said residuary estate
355 was devised and bequeathed to the defendants Ritch,
Bulkley and Vaughan in trust for, and to distribute the same to and among the said Five Colleges and other corporations, but that according to the Laws of the State of New York, namely, Chapter 360 of the Laws of 1860 of the State of New York, the said devise and bequest were void, so far as the said residuary estate exceeded one-half of the total estate of the said Daniel B. Fayerweather, and that as to such excess the defendants Ritch, Bulkley and Vaughan, upon the death of the said Daniel B. Fayerweather, became, and were, and ever since had continued to be, trustees, seized and possessed thereof in trust, to the extent of one-half part of the said excess,
for the benefit of Lucy Fayerweather, deceased,
356 widow of the said Daniel B. Fayerweather, and to
the extent of the remaining half part of the said excess for the benefit of the said complainants. In and by their said answer the said complainants set forth in full the releases, agreements and settlement referred to in the bill herein, and in the complaint attached thereto, and made in respect to the releases, agreements and settlement the same allegations as are made in the bill herein, to wit, that the same were, and that each of them was, obtained by the defendants Ritch, Bulkley and Vaughan by means of fraud, coercion and deception practiced upon the said complainants by them; and in and by the said answer the complainants herein further alleged, and

prayed that by the said Supreme Court it might be adjudged and decreed, that the said releases, agreements and settlement were, and that each of them was, fraudulent and void, and that they and each of them should be vacated and set aside. In and by the said answer the said complainants denied that the said excess belonged to the said Five Colleges and other corporations, and denied that the said Five Colleges and other corporations were, or that any of them was, entitled to receive the same or any portion of the same.

And in and by their said answer the said complain-
357 ants further prayed in said action as follows:

"That the said defendants, Ritch, Bulkley and Vaughan, may be required to account for the moneys and property received by them from the estate of said Daniel B. Fayerweather under said last will and testament and codicils, or otherwise, and for the application thereof, and to pay over the said moneys and property remaining in their hands among the parties to this action, according to their several and respective rights thereto as same may be adjudged in this action.

That the ultimate rights of the parties to this action in the estate of the said Daniel B. Fayerweather be determined and enforced by the judgment in this action,
358 in accordance with the allegations of this answer and the foregoing prayers for relief herein."

The issues raised by the said answer, including the issue as to the validity of the said releases, agreements and settlement, and each of them, were the same issues which are tendered to the defendants herein by the allegations of the complainants' bill. The said issues raised as aforesaid by the said answer and the whole issues in said action were thereafter, and on or about the 24th day of January, 1894, regularly brought on for trial, and were tried at a term of the said Supreme Court, duly held in and for the County of New York, at which presided Hon.

Charles H. Truax, one of the Justices of the said Court. Upon such trial the said complainants produced and gave testimony in support of their said allegations, attacking the validity of the said agreements, releases and settlement, and the same was duly heard and considered by the said Court, and the questions of fact and the questions of law thereby presented were duly argued before the said Court for the said complainants by their counsel, learned in the law, and were likewise considered by the said Court, and upon the issues so presented the Court thereupon decided in favor of the said Five Colleges, and against the complainants herein; and decided that
359 the said Five Colleges and other corporations were entitled to the said residuary estate and to the whole thereof, and that said complainants had no interest therein whatever. At the time of the said trial and decision and of the judgment thereon it was the law of the State of New York, and the statutes of said State provided as follows:

"The decision of the Court, or the report of a Referee, upon the trial of the whole issues of fact, may state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon; or the Court or Referee, in deciding the issues, may file a decision stating
360 concisely the grounds upon which such issues have been decided, and direct the judgment to be entered thereon, which decision so filed shall form part of the judgment roll. In an action where the costs are in the discretion of the Court, the decision or report must award or deny costs, and if it awards costs it must designate the party to whom costs to be taxed are awarded. Whenever judgment is entered on a decision which does not state separately the facts found, the defeated party may file an exception to such decision, in which case, on an appeal from the judgment entered thereon upon a case containing

exceptions, the General Term of the Court in which the action is pending *shall review all questions of fact and of law*, and may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to."

At the request of all the parties to the said action, including the said complainants, the said Court filed, instead of findings of fact and conclusions of law, separately stated, the general decision, which is referred to in
361 the bill and made a part thereof. In accordance with the direction contained in the said decision, the judgment, which is referred to in the said bill, and a copy of which is annexed thereto, was, on or about the 28th day of December, 1894, duly entered and filed in the office of the Clerk of the County of New York, and therein and thereby it was adjudged that the said residuary estate was held in trust by the said defendants Ritch, Bulkley and Vaughan for the said Five Colleges and other corporations, as alleged in the said complaint, and therein and thereby it was further adjudged that the defendants Ritch, Bulkley and Vaughan should distribute, and they were therein and thereby directed to distribute, the said residuary estate as follows, that is to say: To the de-
362 fendant, the Northwestern University, One hundred thousand dollars ($100,000), with its just and equitable proportion of the income, earnings and interest accrued upon the said residuary estate, and the entire remainder of the said residuary estate in equal parts to the said Five Colleges and other corporations, except the said Northwestern University.

Under the provision of law aforesaid the said complainants, on or about the 8th day of January, 1895, filed in the office of the Clerk of the City and County of New York an exception to the said decision, and on or about the 30th day of December, 1894, they duly appealed from said judgment to the General Term of the said Court.

The said appeal was upon a case containing exceptions and containing also all the evidence taken upon the trial of the said action; the said appeal, on or about the 14th day of May, 1895, duly came on for argument before the said General Term, and for hearing by it, and upon such case and exceptions the said appeal was duly argued before, and duly heard, and considered by the said General Term. Upon such argument and hearing the said complainants appeared by their said attorneys and counsel, learned in the law, who, by oral argument and by briefs contended before the said Court in support of the allegations contained in their said answer, and against the
363 validity of the said releases. Upon such argument and hearing of the said appeal the said General Term had jurisdiction, and it was its duty, and the said complainants then claimed and asserted that it had the jurisdiction, and that it was its duty, to review and to decide all the questions of law and all the questions of fact involved in the said action, and to decide upon the evidence then before the Court that the said releases were invalid. The said General Term, in the exercise of the power and jurisdiction conferred upon it by the said laws and in the discharge of its said duty, and at the solicitation and request of the said complainants and each of them, did review and did decide all the questions of law and all the questions of fact presented by the said evidence, rec-
364 ord and argument, including the question as to the validity of the said releases and agreements, and the said General Term thereupon decided that the said residuary estate belonged to and should be distributed among the said Five Colleges and other corporations, as provided in the said Special Term judgment. At the time of such decision it was the law of the State of New York and the statutes of said State provided as follows:

"A judgment affirming wholly or partly a judgment, from which an appeal has been taken, shall not, expressly and in terms, award to the respondent a sum of money or other relief which was awarded to him by the judgment so affirmed."

And the said General Term thereupon affirmed the said judgment, and an order of affirmance and a judgment of affirmance were thereupon duly made and entered. A copy of the opinions of the said General Term, rendered upon its said decision, is hereto annexed, and is made a part hereof. Thereafter the said complainants appealed to the Court of Appeals of the State of New York from the said judgment of affirmance. The said Court of Appeals had jurisdiction to correct, and was, and is, the only Court other than the Supreme Court of the United States having jurisdiction to correct, any error in the judgment of said General Term. The complainants herein, by
365 their said attorneys and counsel, appeared in the said Court of Appeals, and by briefs and oral arguments contended before that Court, in support of the allegations contained in their said answer against the judgment of affirmance and against the validity of the said releases, agreements and settlement, and by briefs and oral arguments in that Court the said complainants, by their said attorneys and counsel, contended that the said judgment of the said General Term should be modified by setting aside the said release, agreements and settlement as inequitable and fraudulent, and by awarding the said residuary estate to the estate of the said Lucy Fayerweather and the said complainants. Thereupon the said Court of Appeals decided that no error had been committed in
366 the decision of the lower Court, affirmed in all respects the said judgment of the said General Term, and upon its said decision and the *remittitur* returned by it by the said Supreme Court, judgment in accordance with said decision was duly entered in the office of the said Clerk. Thereupon, and on or about the first day of March, 1897, the said complainants made a motion in the said Court of Appeals to amend the *remittitur* of that Court so that it should direct the Justice who presided at the trial of the said action to consider the evidence concerning the said releases, agreements and settlement, the law bearing upon the said evidence, agreements and releases, the questions of law and fact propounded for and

against the validity of said agreements and releases, and to determine whether the same were valid and binding or invalid and void. Said motion was made upon an order to show cause, dated the 28th day of January, 1897, the affidavit of William Blaikie, verified the 28th day of January, 1897, a notice of motion dated February 17th, 1897, and the affidavit of William Blaikie, verified the 17th day of February, 1897. Said affidavits alleged in substance and effect the same matters and things alleged in the bill of complaint herein. The said motion was duly heard and considered by the said Court, and after such hearing and consideration was by it denied. Thereafter the
367 reference directed by said judgment was duly brought on for hearing before the Referee therein named, and upon such hearing the said complainants appeared by their said attorneys and participated therein, and the said Referee thereupon made and filed his report, a copy of which is hereto annexed and made a part hereof. Exceptions to said report, a copy of which exceptions is hereto annexed and made a part hereof, were thereupon filed by the said complainants in the office of the said Clerk; and the same were thereupon duly brought on for hearing and a motion was duly made to confirm the said report at a term of the said Supreme Court duly held in and for the County of New York on or about the sixth day of July, 1897. Upon such motion and hearing the said com-
368 plainants by their said attorneys duly appeared and opposed the confirmation of the said report. The said Court thereupon, after due hearing and consideration, overruled the said exceptions and final judgment, a copy of which is hereto annexed and made a part hereof, was thereupon made and entered in the office of the said Clerk on or about the 6th day of July, 1897, wherein and whereby the said report was confirmed by the said Supreme Court, and wherein and whereby it was by said Court adjudged that the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan should distribute, and they were thereby directed to distribute, the said residuary estate in accordance with the terms of the

said first mentioned judgment; all of which matters and things these defendants do aver and plead in bar to the said bill, and humbly pray the judgment of this Honorable Court whether they should make any other or further answer to the said bill, hereby pleaded unto as aforesaid.

And this defendant, not waiving its said plea, but wholly relying and insisting thereon, and in aid and support thereof, for answer to the said bill, or to so much and such part thereof as this defendant is advised it is in any wise material or necessary for it to make answer unto, answering, saith:

369 That it, the said defendant, denies that the defendants, or any of them, requested the Supreme Court of the State of New York to hold or decide that the right of the respective parties in the action mentioned in the bill of complaint to the property and residuary estate therein mentioned, did not require any consideration or decision of the issues tendered in said action by the complainants herein, and it denies that the said Court made or rendered its decision without considering, passing upon or including in judgment the said issues, or omitted to decide upon these complainants' right to the affirmative relief by their answer in said action prayed in respect to the releases therein mentioned.

370 It denies that it was the duty of the General Term of the said Supreme Court of the State of New York to require or order that said issues should be, in fact, considered, passed upon or included in judgment by the Trial Court.

It denies that the said General Term, by various fictions or any fictions of law, imputed to said Trial Term or the Court below that it had determined said issues or had decided in favor of the plaintiffs in said action upon such determination, contrary to the truth and fact, or that said Court pretended to adjudge or determine that there was not sufficient preponderance of evidence to support the asserted invalidity of said releases, to render such im-

puted determination of said Trial Court erroneous as matter of law, or that such imputed determination was supported by evidence sufficient to relieve the same from the assignment of error in so deciding.

It denies that the said General Term did not exercise original jurisdiction and adjudge said issues, or that it confined its action wholly to the consideration of errors in the record.

It denies that the Court of Appeals of the State of New York determined that the complainants herein had no standing to be heard in the said action or to have their rights determined by said Court of Appeals. It de-
371 nies that the judgment in said action is fraudulent, or that any of the defendants have committed any fraud in respect thereof.

And this defendant denies all and all manner of wrongful combination and confederacy wherewith it is by the said bill charged without this, that there is any other matter, cause or thing in the said complainants' said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant. All which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly
372 prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

ROOT, HOWARD, WINTHROP & STIMSON,

Solicitors for the Defendant "The Trustees of Hamilton College,"

32 Liberty Street,

New York City.

SOUTHERN DISTRICT OF NEW YORK, } ss.
City and County of New York, }

Elihu Root, being duly sworn, deposes and says: I am one of the Trustees of the corporation, The Trustees of Hamilton College, one of the defendants in this suit; I have read the foregoing plea and answer of the said defendant, and am familiar with the contents thereof; the said plea and answer are true in point of fact to my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe the said plea and answer to be true; neither
373 the plea nor the answer is interposed for delay.

ELIHU ROOT.

Sworn to before me this 16th }
day of September, 1898. }

FRANCIS R. FORAKER,

[SEAL]. Notary Public.

New York County.

I hereby certify that the foregoing plea and answer are, in my opinion, well founded in point of law.
374 New York, September 16th, 1898.

ELIHU ROOT,
Counsel for Defendant Trustees
of Hamilton College.

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Replication to Hamilton College's Plea to the Amended Bill.

EMMA S. FAYERWEATHER and
375 MARY W. ACHTER,
Complainants,
against
THOMAS G. RITCH, the Trustees of Hamilton College and others,
Defendants.

In Equity No. 6675.

The complainants, repliants, for this their replication to the plea and answer of the defendant The Trustees of Hamilton College, saving and reserving to themselves
376 all and all manner of advantage of exception to the manifold insufficiencies of the said plea and the answer, for replication thereto, say that they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto; and that the said plea and answer are uncertain, untrue and insufficient to be replied to by these complainants; without this, that any other matter or thing whatsoever in the said plea and answer

contained, material or effectual in the law to be replied to, confessed and avoided, traversed or denied, is true to the knowledge or belief of these complainants; all which matters and things these repliants are and will be ready to aver and prove, as this Honorable Court shall direct, and humbly pray, as in and by their said bill, they have already prayed.

ROGER M. SHERMAN,
Solicitor and of Counsel for Complainants.

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378

THE FOLLOWING DEFENDENTS HAVE ADOPTED HAMILTON COLLEGE'S PLEA TO THE AMENDED BILL.

The defendants Northwestern University, University of Rochester, the Trustees of Amherst College, the President and Trustees of Williams College, the Union Theological Seminary in the City of New York, Lafayette College, the Trustees of Columbia College in the City of New York, the Adelbert College of the Western Reserve University have filed pleas to the Amended Bill of Complaint substantially the same as the foregoing plea of the Trustees of Hamilton College; the difference being in the name of each defendant in the first line of the plea, and in the signatures and verifications, and the certificates as to notaries, being, in each instance, those that would naturally go with the pleas of such institutions respectively.

380 NOTE.

Replications like that to Hamilton's plea above have been duly filed to said pleas.

The exhibits in said plea are as follows:

	Pages
1. Exception to Special Term decision see Appendix of Exhibits.....	10 to 14
2. Opinions of General Term.....	52 to 59
3. Referee's Report.....	143 to 159
4. Exceptions thereto.....	160 to 164
5. Final Judgment.....	167 to 182

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

The Amended Plea and Answer of Marietta College, and of those adopting it, to the Amended Bill of Complaint.

381
EMMA S. FAYERWEATHER and MARY W. ACHTER,
Complainants,
against
THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually and as Trustees and Executors of the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the Codicils thereto, and others,
382 Defendants.

In Equity No. 6675.

The amended plea and answer of Marietta College, defendant, to the amended bill of complaint of Emma S. Fayerweather and Mary W. Achter, complainants,

This defendant, by protestation, not confessing or acknowledging the matters and things in and by said amended bill set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged, doth plead in bar to the amended bill, and for plea doth say as follows:

On or about the 26th day of June, 1893, the following-named corporations, defendants herein, and hereinafter referred to as the "Five Colleges"—namely, The Trustees of Amherst College, The Trustees of Dartmouth College, The Trustees of Hamilton College, the University of Rochester, and the President and Trustees of Williams College—brought in the Supreme Court of the State of New York, which court is a Court of Record in the said State, having general jurisdiction in law and equity, the action referred to in the said amended bill, the complaint in which action is thereto annexed. In that action the
383 complainants herein and, except the said Five Colleges, all the defendants herein, were defendants. By their complaint in the said action the said Five Colleges alleged, and prayed that by the said Supreme Court it might be adjudged and decreed, that the entire residuary estate of the said Daniel B. Fayerweather, deceased, was devised and bequeathed to the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan in trust for, and to distribute the same to and among the said Five Colleges and certain other educational corporations which are mentioned in the ninth paragraph of the will of the said Daniel B. Fayerweather and are defendants herein; and in and by the said complaint the said Five Colleges further alleged, and prayed that by the said Supreme Court it might be adjudged and decreed, that
384 the said residuary estate belonged to them and to the said other educational corporations, and that they and the said corporations were entitled to receive the same and the whole of the same from these defendants and from the defendant Thomas G. Ritch.

And the said Five Colleges in and by the said complaint further prayed as follows:

> "That the said defendants Ritch, Bulkley and Vaughan, may be required to account for the moneys received by them under said last will and testament and codicils, and that they may be re-

quired to apply so much thereof as they may have received upon the trusts hereinbefore stated to the purposes of said trust.

That the ultimate rights of the plaintiffs as between them and each of them, and every of the other defendants herein, be determined by the judgment in this action, in accordance with the allegations of this complaint and the prayer hereinbefore contained."

The complainants herein, by their duly authorized attorney, learned in the law, duly appeared in the said
385 action and served and filed an answer to the said complaint, a copy of which answer is annexed to the said amended bill. In and by the said answer the said complainants alleged, and prayed that by the said Supreme Court it might be adjudged and decreed, that the said residuary estate was devised and bequeathed to the defendants Ritch, Bulkley and Vaughan in trust for and to distribute the same to and among the said Five Colleges and other corporations, but that according to the laws of the State of New York, namely, Chapter 360 of the laws of 1860 of the State of New York, the said devise and bequest were void so far as the said residuary estate and the legacies given by the eighth and ninth clauses of the will attached to the said amended bill
386 and marked "Exhibit A" exceeded one-half of the total estate of the said Daniel B. Fayerweather, and that as to such excess the defendants Ritch, Bulkley and Vaughan upon the death of the said Daniel B. Fayerweather became and were, and ever since had continued to be, trustees, seized and possessed thereof in trust, to the extent of one-half part of the said excess for the benefit of Lucy Fayerweather, deceased, widow of the said Daniel B. Fayerweather, and to the extent of the remaining half-part of the said excess for the benefit of the said complainants. In and by their said answer the said complainants set forth in full the releases, agreements and settlement referred to in the said amended bill and in the

complaint attached thereto and made in respect to the said releases, agreements and settlement the same allegations as are made in the said amended bill, to wit.: that the same were, and that each of them was, obtained by the defendants Ritch, Bulkley and Vaughan by means of fraud, coercion and deception practiced upon the said complainants by them and in and by the said answer the complainants herein further alleged, and prayed that by the said Supreme Court it might be adjudged and decreed, that the said releases, agreements and settlement were, and that each of them was fraudulent and void, and that
387 they and each of them should be vacated and set aside.

In and by their said answer the said complainants denied that the said excess belonged to the said Five Colleges and other corporations and denied that the said Five Colleges and other corporations were, or that any of them was, entitled to receive the same or any portion of the same.

And in and by their said answer the said complainants further prayed in said action as follows:

"That the said defendants, Ritch, Bulkley and Vaughan, may be required to account for the moneys and property received by them from the estate of said Daniel B. Fayerweather under said
388 last will and testament and codicils, or otherwise, and for the application thereof, and to pay over the said moneys and property remaining in their hands among the parties to this action, according to their several and respective rights thereto as the same may be adjudged in this action.

That the ultimate rights of the parties to this action in the estate of the said Daniel B. Fayerweather be determined and enforced by the judgment in this action, in accordance with the allegations of this answer and the foregoing prayers for relief herein."

The issues raised by the said answer, including the

issue as to the validity of the said releases, agreements and settlement, and each of them, were the same issues which are tendered to the defendants herein by the allegations of the complainants' amended bill. The said issues raised as aforesaid by the said answer and the whole issues in said action were thereafter and on or about the 24th day of January, 1894, regularly brought on for trial, and were tried at a term of the said Supreme Court duly held in and for the County of New York, at which presided Hon. Charles H. Truax, one of the Justices of the said Court. Upon such trial the said com-

plainants produced and gave testimony in support
389 of their said allegations, attacking the validity of

the said agreements, releases and settlement, and the same was duly heard and considered by the said Court, and the questions of fact and the questions of law thereby presented were duly argued before the said Court for the said complainants by their counsel learned in law and were likewise considered by the said Court and upon the issues so presented, the Court thereupon decided in favor of the said Five Colleges and against the complainants herein; and decided that the said Five Colleges and other corporations were entitled to the said residuary estate and to the whole thereof, and that said complainants had no interest whatever in the said residuary estate.

At the time of the said trial and decision and of the
390 judgment entered thereon, as hereinafter alleged, the

law of the State of New York was, and the statutes of the said State provided, as follows:

> "The decision of the Court, or the report of a Referee, upon the trial of the whole issues of fact, may state separately the facts found and the conclusions of law and direct the judgment to be entered thereon; or the Court or Referee in deciding the issues may file a decision stating concisely the grounds upon which such issues have been decided, and direct the judgment to be entered thereon, which decision so filed, shall form

part of the judgment roll. In an action where the costs are in the discretion of the Court, the decision or report must award or deny costs, and if it awards costs it must designate the party to whom costs to be taxed are awarded. Whenever judgment is entered on a decision which does not state separately the facts found, the defeated party may file an exception to such decision, in which case on an appeal from the judgment entered thereon, upon a case containing exceptions, the General Term of the Court in which the action is pending shall review all questions of fact
391 and of law, and may either modify or affirm the judgment or order appealed from, award a new trial or grant to either party such judgment as such party may be entitled to."

At the request of all the parties to the said action, including the said complainants, the said Court filed, instead of findings of fact and conclusions of law separately stated, the general decision, which is referred to in the said amended bill and made a part thereof. In accordance with the direction contained in the said decision, the judgment, which is referred to in the said amended bill and a copy of which is annexed thereto,
was, on or about the 28th day of December, 1894,
392 duly entered and filed in the office of the Clerk of the County of New York, and therein and thereby it was adjudged that the said residuary estate was held in trust by the said defendants Ritch, Bulkley and Vaughan for the said Five Colleges and other corporations, as alleged in the said complaint, and therein and thereby it was further adjudged that the defendants Ritch, Bulkley and Vaughan should distribute, and they were therein and thereby directed to distribute the said residuary estate as follows, that is to say, to the defendant the Northwestern University the sum of One hundred thousand dollars ($100,000), with its just and equitable proportion of the income, earnings and interest accrued upon the said resid-

nary estate, and the entire remainder of the said residuary estate in equal parts to the said Five Colleges and other corporations, except the said Northwestern University.

Under the provisions of law aforesaid, the said complainants, on or about the 8th day of January, 1895, filed in the office of the Clerk of the City and County of New York an exception to the said decision, they duly appealed from the said judgment to the General Term of said Court. A copy of the complainants' notice of such exception and a copy of their notice of appeal from the said judgment are hereto annexed. The said
393 appeal was upon a case containing exceptions and containing also all the evidence taken upon the trial of the said action. On or about the 14th day of May, 1895, the said appeal duly came on for argument before the said General Term, and for hearing by it, and upon such case and exceptions the said appeal was duly argued before, and duly heard and considered by, the said General Term. Upon such argument and hearing, the said complainants appeared by their said attorney and counsel learned in the law, who by oral argument and by briefs contended before the said Court in support of the allegations contained in their said answer, and against the validity of the said releases, agreements and settlement. Upon such argument
394 and hearing of the said appeal, the said General Term had jurisdiction, and it was its duty, and the said complainants then claimed and asserted that it had the jurisdiction, and that it was its duty, to review and to decide all the questions of law and all the questions of fact involved in the said action, and to decide upon the evidence then before the Court that the said releases, agreements and settlement were invalid. The said General Term, in the exercise of the power and jurisdiction conferred upon it by the said laws and in the discharge of its said duty, and at the solicitation and request of the said complainants and each of them, did review and did decide all the questions of law and all the questions of

fact presented by the said evidence, record and argument, including the question as to the validity of the said releases, agreements and settlement, and the said General Term thereupon decided that the said residuary estate belonged to, and should be distributed among, the said Five Colleges and other corporations as provided in the said judgment. At the time of such decision the law of the State of New York was, and the statutes of the said State provided, as follows:

"A judgment, affirming wholly or partly a judgment,
from which an appeal has been taken, shall not,
395 expressly and in terms, award to the respondent,
a sum of money, or other relief, which was
awarded to him by the judgment so affirmed."

And the said General Term thereupon affirmed the judgment and an order of affirmance and a judgment of affirmance were thereupon duly made and entered. A copy of the opinions of the said General Term, rendered upon its said decision, is hereto annexed and is made a part hereof. A copy of the said order of affirmance and a copy of the said judgment of affirmance are also hereto annexed and made a part hereof.

Thereafter the said complainants appealed to the Court
of Appeals of the State of New York from the said
396 judgment of affirmance. The said Court of Appeals
had jurisdiction to correct, and was and is the only court other than the Supreme Court of the United States having jurisdiction to correct, any error in the judgment of the said General Term. The complainants herein, by their said attorneys and counsel, appeared in the said Court of Appeals, and by briefs and oral argument contended before that Court, in support of the allegations contained in their said answer, and against the judgment of affirmance, and against the validity of the said releases, agreements and settlement, and by briefs and oral argument in that court, the said complainants by their said attorneys and counsel contended that the said judgment

of the said General Term should be modified by setting aside the said releases, agreements and settlement as inequitable and fraudulent and by awarding the said residuary estate and the amount of the said legacies given by the said eighth and ninth clauses, so far as they together exceeded one-half of the estate of the said Daniel B. Fayerweather, to the estate of the said Lucy Fayerweather and to the said complainants. Thereupon the said Court of Appeals decided that no error had been committed in the decision of the lower court, and affirmed in all respects the said judgment of the said General Term.

A copy of the opinions rendered upon said decisions
397 is hereto annexed, as part hereof.

Upon its said decision and the *remittitur* returned by said Court of Appeals to the said Supreme Court, judgment, in accordance with the said decision, was duly entered in the office of the said clerk. A copy of the order directing such judgment is also hereto annexed and made a part hereof. Thereupon and on or about the first day of March, 1897, the said complainants made a motion in the said Court of Appeals to amend the *remittitur* of that court so that it should direct the Justice who presided at the trial of the said action to "consider" the evidence concerning the said releases, agreements and settlements, the law bearing upon the said evidence, agreements and releases, the questions of law and fact propounded
398 for and against the validity of said agreements and releases, and to determine whether the same were valid and binding or invalid and void. Said motion was made upon an order to show cause, dated the 28th day of January, 1897, the affidavit of William Blaikie, verified the 28th day of January, 1897, a notice of motion dated February 17, 1897, and the affidavit of William Blaikie verified the 17th day of February, 1897. Copies of said papers are hereto annexed and made part hereof. Said affidavits alleged in substance and effect the same matters and things alleged in the amended bill herein. The said motion was duly heard and considered by the said Court, and after such hearing and consideration the same was by

it denied. Thereafter the reference directed by the said judgment entered as aforesaid on or about the 28th day of December, 1894, was duly brought on for hearing before the Referee therein named and upon such hearing the said complainants appeared by their said attorneys and counsel, learned in the law, and participated therein, and the said Referee thereupon made and filed his report, a copy of which is hereto annexed and made a part hereof. Exceptions to the said report, a copy of which exceptions is hereto annexed and made a part hereof, were thereupon filed by the said complainants in the office of

the said Clerk; and the same were thereupon duly
399 brought on for hearing, and a motion was duly made

to confirm the said report, at a term of the said Supreme Court duly held in and for the said County of New York on or about the sixth day of July, 1897. Upon such motion and hearing the said complainants, by their said attorneys and counsel, duly appeared and opposed the confirmation of the said report. The said Court thereupon, after due hearing and consideration, overruled the said exceptions, and a final judgment, a copy of which is hereto annexed and made a part hereof, was thereupon made and entered in the office of the said Clerk on or about the 6th day of July, 1897, wherein and whereby the said report was confirmed by the said Supreme Court,

and wherein and whereby it was by the said Court
400 adjudged that the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan should distribute, and they were thereby directed to distribute the said residuary estate in accordance with the terms of the said first mentioned judgment; and thereupon the said defendants, pursuant to the directions contained in the said judgment, proceeded to pay and distribute, and from time to time thereafter they did pay and distribute a large part of the estate of the said Daniel B. Fayerweather to and among the corporations entitled thereto under the said judgment, and such payment and distribution were by them continued down to a time prior to the date when was made by the complainant herein a mo-

tion for an order restraining and enjoining the said defendants from such payment and distribution. Such motion having been granted and such an order having been made, no such further payment or distribution was made by the said defendants until the said order, upon an appeal therefrom, had been reversed by the United States Circuit Court of Appeals and an order of reversal duly entered; whereupon such payment and distribution were by the said defendants resumed, and have been from time to time continued down to the present time as compelled by the said judgment.

All of which matters and things this defendant doth
401 aver and plead in bar to the said amended bill, and humbly prays judgment of this Honorable Court whether it should make any other or further answer to the said amended bill, hereby pleaded unto as aforesaid.

And this defendant, not waiving the above plea, but wholly relying and insisting thereon, and in aid and support thereof for answer to the said amended bill, or to so much and such part thereof as it is deemed that it is in anywise material or necessary to make answer unto, answering:

Denies that the defendants, or any of them, requested or induced the Supreme Court of the State of New
402 York to hold or decide that the right of the respective parties in the action mentioned in the said amended bill to the property and residuary estate therein mentioned, did not require any consideration or decision of the issues tendered in said action by the complainants herein, and denies that the said Court made or rendered its decision without considering, passing upon or including in judgment the said issues, or omitted to decide upon these complainants' right to the affirmative relief by their answer in said action prayed in respect to the estates therein mentioned.

Denies that it was the duty of the General Term of the said Supreme Court of the State of New York to require

or order that said issues should be in fact considered, passed upon or included in judgment by the trial Court otherwise than as was done.

Denies that it was by various fictions, or any fictions of law, that the said General Term imputed to said Trial Term or the Court below that it had determined said issues or had decided in favor of the plaintiffs in said action upon such determination, or that this was contrary to the truth and fact, or that said Court pretended to adjudge or determine, that there was not sufficient preponderance of evidence to support the asserted invalidity of said releases to render such imputed determination of said
403 trial Court erroneous as to matter of law, or that imputed determination was supported by evidence sufficient to relieve the same from the assignment of error in so deciding.

Denies that it was not competent for the said General Term to have exercised an original jurisdiction, and to have adjudged said issues, and thereupon to have modified said judgment, or that the said General Term did not exercise original jurisdiction and adjudge such issues, or that it confined its action wholly to the consideration of errors in the record.

Denies that the Court of Appeals of the State of New York determined that the complainants herein had no standing to be heard in the said action or to have
404 their rights determined by the said Court of Appeals.

Denies that the judgment in the said action is fraudulent, or that any of the defendants have committed any fraud in respect thereof.

Denies all and all manner of wrongful combination and confederacy wherewith it is by the said bill charged, without this, that any other matter, cause or thing in the said complainants' amended bill contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant.

All of which matters and things this defendant is ready

and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

MARIETTA COLLEGE,

By W. W. MILLS, Trustee.

RITCH, WOODFORD, BOVEE & WALLACE,

Solicitors for said Defendant.

405

SOUTHERN DISTRICT OF OHIO,
State of Ohio, } ss.
COUNTY OF WASHINGTON.

I, W. W. MILLS, being sworn, depose and say: I am one of the Trustees of the corporation, Marietta College, a defendant herein. I have read the foregoing amended plea and answer in support thereof, and am familiar with their contents; the said amended plea and answer are true in point of fact to my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe the said amended plea and answer to be true; neither the said amended plea nor the said answer is interposed for delay.

406

WILLIAM W. MILLS.

Sworn to before me this 21st day of August, 1899.

CLARENCE E. SAWYER,

[SEAL]. Notary Public,

Washington County,

Ohio.

STATE OF OHIO,
County of Washington, } ss.
SOUTHERN DISTRICT OF OHIO.

10 Cents
Internal Revenue
Stamp.

I, ORLANDO TROTTER, Clerk of the Common Pleas Court, in said County, the same being a Court of Record, having by law a seal, do hereby certify that R. L. Nye,
who submitted the annexed certificate, was at the
407 time of taking the same, a notary public residing in
the said county, and duly authorized by the laws of Ohio to take the acknowledgment and proof of deeds to be recorded therein, and that the same is taken and certified in all respects as required by the laws of said State; that I am well acquainted with the handwriting of said R. L. Nye, and verily believe the signature attached to the said certificate to be his genuine signature.

Witness my hand and official seal this 21st day of August, 1899.

[SEAL]. ORLANDO TROTTER, Clerk,

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I hereby certify that the foregoing amended plea and answer are in my opinion well founded in point of law.

New York, August 17th, 1899.

C. N. BOVEE, JR.

{ SEAL OF COMMON PLEAS COURT. }

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410 ment the Judgment of Supreme Court	165–166
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THE FOLLOWING DEFENDANTS HAVE ADOPTED THE PLEA OF MARIETTA COLLEGE TO THE AMENDED BILL.

The defendants Wesleyan University at Middletown, Conn., Cornell University, the President and Fel-
411 lows of Yale College at New Haven, Conn., the Presbyterian Hospital in the City of New York, St. Luke's Hospital in the City of New York and the Manhattan Eye and Ear Infirmary in the City of New York have filed pleas to the Amended Bill of Complaint substantially the same as the foregoing plea of Marietta College, the difference being in the names of each defendant in the first line of the plea, and in the signatures and verifications, and the certificates as to notaries being in each instance those that would naturally go with the pleas of such institutions respectfully.

Also Thos. G. Ritch, individually and as Executor and Trustee of the Estate of Daniel B. Fayerweather, deceased, and Mt. Sinai Hospital, and the Trustees of Dartmouth College. and Trustees of Bowdoin College

Upon pages 207 and 208 of this Volume the Amended Answer of Mt. Sinai Hospital to the Amended Bill of Complaint was formerly printed.

Mt. Sinai Hospital afterwards withdrew said Amended Answer, and adopted a Plea to the Amended Bill of Complaint, like that of Hamilton College, under GENERAL ORDER of May 16th, 1902, of Lacombe, J. (See Vol. 1V., page 657.

Said pages 207 and 208 hereof are therefore omitted.

PLEA AND ANSWER OF JUSTUS L. BULKLEY AND HENRY B. VAUGHAN TO AMENDED BILL OF COMPLAINT.

IN THE CIRCUIT COURT OF THE UNITED STATES.

417 FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and MARY W. ACHTER, Complainants, *against* THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. 418 VAUGHAN, Individually and as Trustees and Executors of the Last Will and Testament of DANIEL B. FAYERWEATHER, deceased, and of the Codicils thereto, and others. Defendants.	**In Equity, No. 6675.**

The joint and several plea and answer of Justus L. Bulkley and Henry B. Vaughan, individually and as trustees and executors of the last will and testament of Daniel B. Fayerweather, deceased, and of the codicils thereto, defendants, to the amended bill of complaint of Emma S. Fayerweather and Mary W. Achter, complainants.

These defendants, by protestation, not confessing or

acknowledging the matters and things in and by said amended bill set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged, do plead in bar to the amended bill and for plea do say as follows:

On or about the 26th day of June, 1893, the following named corporations, defendants herein, and hereinafter referred to as the "Five College," namely, The Trustees of Amherst College, The Trustees of Dartmouth College, The Trustees of Hamilton College, The University of Rochester, and the President and Trustees of Wil-
419 liams College, brought in the Supreme Court of the State of New York, which court is a court of record in the said state, having general jurisdiction in law and equity, the action referred to in the said amended bill, the complaint in which action is thereto annexed. In that action the complainants herein and, except the said Five Colleges, all the defendants herein were defendants. By their complaint in the said action the said Five Colleges alleged, and prayed that by the said Supreme Court it might be adjudged and decreed, that the entire residuary estate of the said Daniel B. Fayerweather, deceased, was devised and bequeathed to the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan in trust for, and to distribute the same to and among, the
420 said Five Colleges and certain other educational corporations which are mentioned in the ninth paragraph of the will of the said Daniel B. Fayerweather and are defendants herein; and in and by the said complaint the said Five Colleges further alleged, and prayed that by the said Supreme Court it might be adjudged and decreed, that the said residuary estate belonged to them and to the said other educational corporations, and that they and the said corporations were entitled to receive the same and the whole of the same from these defendants and from the defendant Thomas G. Ritch.

And the said Five Colleges in and by the said complaint further prayed as follows:

"That the said defendants, Ritch, Bulkley and Vaughan, may be required to account for the moneys received by them under said last will and testament and codicils, and that they may be required to apply so much thereof as they may have received upon the trusts hereinbefore stated to the purposes of said trust.

That the ultimate rights of the plaintiffs, as between them and each of them, and every of the other defendants herein, be determined by the judgment in this action, in accordance with the allegations of this complaint and the prayer hereinbefore contained."

421 The complainants herein, by their duly authorized attorney, learned in the law, duly appeared in the said action and served and filed an answer to the said complaint [a copy of which answer is annexed to the said amended bill]. In and by the said answer the said complainants alleged, and prayed that by the said Supreme Court it might be adjudged and decreed, that the said residuary estate was devised and bequeathed to the defendants Ritch, Bulkley and Vaughan in trust for and to distribute the same to and among the said Five Colleges and other corporations, but that according to the laws of the State of New York, namely, Chapter 360 of the laws of 1860 of the State of New York, the said devise and be-

422 quest were void so far as the said residuary estate [and the legacies given by the eighth and ninth clauses of the will attached to the said amended bill and marked "Exhibit A"] exceeded one-half of the total estate of the said Daniel B. Fayerweather, and that as to such excess the defendants Ritch, Bulkley and Vaughan upon the death of the said Daniel B. Fayerweather became and were, and ever since had continued to be, trustees, seized and possessed thereof in trust, to the extent of one-half part of the said excess for the benefit of Lucy Fayerweather, deceased, widow of the said Daniel B. Fayerweather, and to the extent of the remaining half part of the said excess for the benefit of the said complainants. In and by their said answer the said com-

plainants set forth in full the releases, agreements and settlement referred to in the said amended bill and in the complaint attached thereto and made in respect to the said releases, agreements and settlement the same allegations as are made in the said amended bill, to wit, that the same were, and that each of them was, obtained by the defendants Ritch, Bulkley and Vaughan by means of fraud, coercion and deception practiced upon the said complainants by them; and in and by the said answer the complainants herein further alleged, and prayed that by the said Supreme Court it might be adjudged and decreed,

that the said releases, agreements and settlement
423 were, and that each of them was fraudulent and void,

and that they and each of them should be vacated and set aside. In and by their said answer the said complainants denied that the said excess belonged to the said Five Colleges and other corporations, and denied that the said Five Colleges and other corporations were, or that any of them was, entitled to receive the same or any portion of the same.

And in and by their said answer the said complainants further prayed in said action as follows:

"That the said defendants, Ritch, Bulkley and Vaughan, may be required to account for the moneys and

property received by them from the estate of said
424 Daniel B. Fayerweather under said last will and testament and codicils, or otherwise, and for the application thereof, and to pay over the said moneys and property remaining in their hands among the parties to this action, according to their several and respective rights thereto as the same may be adjudged in this action.

That the ultimate rights of the parties to this action in the estate of the said Daniel B. Fayerweather be determined and enforced by the judgment in this action, in accordance with the allegations of this answer aud the foregoing prayers for relief herein."

The issues raised by the said answer, including the is-

sue as to the validity of the said releases, agreements and settlement, and each of them, were the same issues which are tendered to the defendants herein by the allegations of the complainants' amended bill. The said issues raised as aforesaid by the said answer and the whole issues in said action were thereafter and on or about the 24th day of January, 1894, regularly brought on for trial, and were tried at a term of the said Supreme Court duly held in and for the County of New York, at which presided Hon. Charles H. Truax, one of the Justices of the said Court. Upon such trial the said complainants produced and gave
testimony in support of their said allegations, attack-
425 ing the validity of the said agreements, releases and
settlement, and the same was duly heard and considered by the said Court, and the questions of fact and the questions of law thereby presented were duly argued before the said Court for the said complainants by their counsel learned in the law and were likewise considered by the said Court, and *upon the issues so presented*, the Court thereupon decided in favor of the said Five Colleges and against the complainants herein; and decided that that the said Five Colleges and other corporations were entitled to the said residuary estate and to the whole thereof, and that said complainants had no interest whatever in the said residuary estate. At the time of the said
trial and decision and of the judgment entered there-
426 on, as hereinafter alleged, the law of the State of
New York was, and the statutes of the said state provided, as follows:

"The decision of the court, or the report of a referee upon the trial of the whole issues of fact, may state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon; or the court or referee, in deciding the issues, may file a decision stating concisely the grounds upon which such issues have been decided, and direct the judgment to be entered thereon, which decision so filed shall form part of the judgment roll. In an action where the costs are in the

discretion of the court, the decision or report must award or deny costs, and if it awards costs it must designate the party to whom costs to be taxed are awarded. Whenever judgment is entered on a decision which does not state separately the facts found, the defeated party may file an exception to such decision, in which case, on an appeal from the judgment entered thereon upon a case containing exceptions, the general term of the court in which the action is pending shall review all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial or grant to either party such judgment as such party may be entitled
427 to."

At the request of all the parties to the said action, including the said complainants, the said court filed, instead of findings of fact and conclusions of law separately stated, the general decision, which is referred to in the said amended bill and made a part thereof. In accordance with the direction contained in the said decision, the judgment, which is referred to in the said amended bill and a copy of which is annexed thereto, was, on or about the 28th day of December, 1894, duly entered and filed in the office of the Clerk of the County of New York, and therein and thereby it was adjudged that the said residuary estate was held in trust by the said defendants
428 Ritch, Bulkley and Vaughan for the said Five Colleges and other corporations, as alleged in the said complaint, and therein and thereby it was further adjudged that the defendants Ritch, Bulkley and Vaughan should distribute, and they were therein and thereby directed to distribute the said residuary estate as follows, that is to say, to the defendant the Northwestern University the sum of One hundred thousand dollars ($100,000), with its just and equitable proportion of the income, earnings and interest accrued upon the said residuary estate, and the entire remainder of the said residuary estate in equal parts to the said Five Colleges and other corporations, except the said Northwestern University.

Under the provisions of law aforesaid, the said complainants, on or about the 8th day of January, 1896, filed in the office of the Clerk of the City and County of New York an exception to the said decision, and on or about the 30th day of December, 1896, they duly appealed from the said judgment to the general term of said court. [A copy of the complainants' notice of such exception and a copy of their notice of appeal from the said judgment are hereto annexed]. The said appeal was upon a case containing exceptions and containing also all the evidence taken upon the trial of the said action. On or about the 14th day of May, 1897, the said appeal duly came on to be for argument before the said general term, and for hearing by it, and upon such case and exceptions the said appeal was duly argued before, and duly heard and considered by, the said general term. Upon such argument and hearing, the said complainants appeared by their said attorneys and counsel learned in the law, who by oral argument and by briefs contended before the said court in support of the allegations contained in their said answer, and against the validity of the said release, agreements and settlement. Upon such argument and hearing of the said appeal, *the said general term found jurisdiction, and it was its duty*, and the said complainants then claimed and asserted that it had the jurisdiction, and that it was its duty, to review and to decide on all the questions of law and all the questions of fact involved in the said action, and to *decide upon the evidence then before the Court that the said releases [agreements and settlement] were invalid*. The said general term, in the exercise of the power and jurisdiction conferred upon it by the said laws and in the discharge of its said duty, and at the solicitation and request of the said complainants and each of them, did review and did decide all the questions of law and all the questions of fact presented by the said evidence, record and argument, including the question as to the validity of the said releases, agreements and settlement, and the said general term thereupon decided that the said testimony sustained

longed to, and should be distributed among, the said Five Colleges and other corporations as provided in the said Special Term judgment. At the time of such decision the law of the State of New York was, and the statutes of the said state provided, as follows:

"A judgment, affirming wholly or partly a judgment, from which an appeal has been taken, shall not, expressly and in terms, award to the respondent, a sum of money, or other relief, which was awarded to him by the judgment so affirmed."

431 And the said general term thereupon affirmed the said judgment and an order of affirmance and a judgment of affirmance were thereupon duly made and entered. A copy of the opinions of the said general term, rendered upon its said decision, is hereto annexed and is made a part hereof. [A copy of the said order of affirmance and a copy of the said judgment of affirmance are also hereto annexed and made a part hereof]. Thereafter the said complainants appealed to the Court of Appeals of the State of New York from the said judgment of affirmance. The said Court of Appeals had jurisdiction to correct, and was and is the only court other than the Supreme Court of the United States having jurisdiction to correct, any error in the judgment of the said general term. The
432 complainants herein, by their said attorneys and counsel, appeared in the said Court of Appeals, and by briefs and oral argument contended before that court, in support of the allegations contained in their said answer, and against the judgment of affirmance, and against the validity of the said releases, agreements and settlement, and by briefs and oral argument in that court, the said complainants by their said attorneys and counsel contended that the said judgment of the said general term should be modified by setting aside the said releases, agreements and settlement as inequitable and fraudulent and by awarding the said residuary estate [and the amount of the said legacies given by the said eighth and

ninth clauses, so far as they together exceeded one-half of the estate of the said Daniel B. Fayerweather], to the estate of the said Lucy Fayerweather and to the said complainants. Thereupon the said Court of Appeals decided that no error had been committed in the decision of the lower court, affirmed in all respects the said judgment of the said general term and upon its said decision and the *remittitur* returned by it to the said Supreme Court, judgment, in accordance with the said decision, was duly entered in the office of the said clerk. [A copy of the said last mentioned judgment is also hereto annexed and made a part hereof]. Thereupon and on or about the first
433 day of March, 1897, the said complainants made a motion in the said Court of Appeals to amend the *remittitur* of that court so that it should direct the Justice who presided at the trial of the said action to "consider" the evidence concerning the said releases, agreements and settlements, the law bearing upon the said evidence, agreements and releases, the questions of law and fact propounded for and against the validity of said agreements and releases, and to determine whether the same were valid and binding or invalid and void. Said motion was made upon an order to show cause, dated the 28th day of January, 1897, the affidavit of William Blaikie, verified the 28th day of January, 1897, a notice of motion dated February 17th, 1897, and the affidavit of Wil-
434 liam Blaikie verified the 17th day of February, 1897.

Said affidavits alleged in substance and effect the same matters and things alleged in the amended bill herein. The said motion was duly heard and considered by the said court, and after such hearing and consideration the same was by it denied. Thereafter the reference directed by the said judgment [entered as aforesaid on or about the 28th day of December, 1894], was duly brought on for hearing before the referee therein named and upon such hearing the said complainants appeared by their said attorneys [and counsel, learned in the law] and participated therein, and the said referee thereupon made and filed his report, a copy of which is hereto annexed

and made a part hereof. Exceptions to the said report, a copy of which exceptions is hereto annexed and made a part hereof, were thereupon filed by the said complainants in the office of the said clerk; and the same were thereupon duly brought on for hearing, and a motion was duly made to confirm the said report, at a term of the said Supreme Court duly held in and for the said County of New York on or about the sixth day of July, 1897. Upon such motion and hearing the said complainants by their said attorneys [and counsel] duly appeared and opposed the confirmation of the said report. The said court thereupon after due hearing and consideration overruled
435 the said exceptions, and a final judgment, a copy of which is hereto annexed and made a part hereof, was thereupon made and entered in the office of the said clerk on or about the 6th day of July, 1897, wherein and whereby the said report was confirmed by the said Supreme Court and wherein and whereby it was by the said court adjudged that the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan should distribute, and they were thereby directed to distribute the said residuary estate in accordance with the terms of the said first mentioned judgment; [and thereupon these defendants and the defendant Thomas G. Ritch, pursuant to the directions contained in the said judgment, proceeded to pay and distribute, and from time to time thereafter they
436 did pay and distribute, a large part of the estate of the said Daniel B. Fayerweather to and among the corporations entitled thereto under the said judgment, and such payment and distribution were by them continued down to a time prior to the date when was made by the complainants herein a motion for an order restraining and enjoining these defendants and the defendant Thomas G. Ritch from such payment and distribution. Such motion having been granted and such an order having been made, no such further payment or distribution was made by these defendants and the defendant Thomas G. Ritch until the said order, upon an appeal therefrom had been reversed by the United States Circuit Court of Ap-

peals and an order of reversal duly entered; whereupon such payment and distribution were by these defendants and the defendant Thomas G. Ritch resumed and have been from time to time continued down to the present time as compelled by the said judgment]; all of which matters and things these defendants do aver and plead in bar to the said amended bill, and humbly pray judgment of this Honorable Court whether they should make any other or further answer to the said amended bill, hereby pleaded unto as aforesaid.

And those defendants, not waiving their said plea,
437 but wholly relying and insisting thereon, and in aid and support thereof, for answer to the said amended bill, or to so much and such part thereof as they are advised that it is in anywise material or necessary for them to make answer unto, answering:

Deny that the defendants or any of them, requested the Supreme Court of the State of New York to hold or to decide that the right of the respective parties in the action mentioned in the said amended bill to the property and residuary estate therein mentioned, did not require any consideration or decision of the issues tendered in said action by the complainants herein, and deny that the
said court made or rendered its decision without con-
438 sidering, passing upon or including in judgment the said issues, or omitted to decide upon these complainants' right to the affirmative relief by their answer in said action prayed in respect to the releases therein mentioned:

Deny that it was the duty of the general term of the said Supreme Court of the State of New York to require or order that said issues should be in fact considered, passed upon or included in judgment by the trial court [otherwise than as was done]:

Deny that it was by various fictions, or any fictions of

law, that the said general term imputed to said trial term or the court below that it had determined said issues or had decided in favor of the plaintiffs in said action upon such determination, or that this was contrary to the truth and fact, or that said court pretended to adjudge or determine, that there was not sufficient preponderance of evidence to support the asserted invalidity of said releases, to render such imputed determination of said trial court erroneous as [to] matter of law, or that such imputed determination was supported by evidence sufficient to relieve the same from the assignment of error in so deciding:

439 Deny [that it was not competent for the said general term to have exercised an original jurisdiction and to have adjudged said issues and thereupon to have modified said judgment, and] that the said general term did not exercise original jurisdiction and adjudge such issues, or *that it confined its action wholly to the consideration of the errors in the record:*

Deny that the Court of Appeals of the State of New York determined that the complainants herein had no standing to be heard in the said action or to have their rights determined by the said Court of Appeals:

Deny that the judgment in the said action is fraud-
440 ulent or that any of the defendants have committed any fraud in respect thereof:

Deny all and all manner of fraud, wrongful combination and confederacy wherewith they are by the said bill charged, without this, that any other matter, cause or thing in the said complainants' amended bill contained, material or necessary for these defendants, in support of their said plea, to make answer unto, and not herein and hereby well and sufficiently answered, traversed, confessed, and avoided, or denied, is true to the knowledge or belief of these defendants.

All of which matters and things these defendants are ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JUSTUS L. BULKLEY.

H. B. VAUGHAN.

PARSONS, SHEPARD & OGDEN,

441 Solicitors for the defendants, Justus L. Bulkley and Henry B. Vaughan, individually and as trustees and executors,

111 Broadway,

New York City.

SOUTHERN DISTRICT OF NEW YORK, } ss.:
County of New York. }

JUSTUS L. BULKLEY and HENRY B. VAUGHAN being duly and severally sworn severally depose and say: I am one of the defendants herein. I have read the foregoing plea and answer in support thereof, and am familiar
442 with their contents; the said plea and answer are true in point of fact to my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe the said plea and answer to be true; neither the said plea nor the said answer is interposed for delay.

JUSTUS L. BULKLEY,

H. B. VAUGHAN.

Sworn to before me this 1st day of August, 1899.

By JUSTUS L. BULKLEY.

And this 7th day of August, 1899,

By HENRY B. VAUGHAN,

WILLIAM E. CARNOCHAN,

[SEAL] Notary Public,

New York County.

441 I hereby certify that the foregoing plea and answer in support thereof are in my opinion well founded in point of law.

New York, August 7th, 1899.

JNO. E. PARSONS.

442

FOR THE EXHIBITS TO THE ABOVE PLEA AND ANSWER OF DEFENDANTS BULKLEY AND VAUGHAN SEE APPENDIX OF EXHIBITS AS FOLLOWS, VIZ.:

445	Exhibit	Pages.
Exception	2	10 to 14
Notice of Appeal to General Term	3	15 to 20
Opinion of General Term	5	52 to 59
Order of Affirmance of General Term	6	60 to 62
Judgment of Affirmance by General Term	7	63 to 69
Order on Remittitur from Court of Appeals	12	165 to 166
Referee's Report	10	143 to 149
Exceptions to Referee's Report	11	160 to 164
Final Judgment	13	167 to 182

446

ANSWER OF JOHN B. REYNOLDS, EXECUTOR OF THE LAST WILL OF LUCY FAYERWEATHER TO AMENDED BILL OF COMPLAINT.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

447

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Complainants,
against
THOMAS G. RITCH and others,
448 Defendants.

No. 6675.

To the Judges of the Circuit Court of the United States for the Southern District of New York.

JOHN B. REYNOLDS, as Executor of the last Will and testament of Lucy Fayerweather, deceased, and of the codicil thereto, answering the bill of complaint, herein alleges:

That on or about the 15th day of November, 1890, Daniel B. Fayerweather departed this life at the City of New York. But the writings described in the bill of complaint as the Will and codicils thereto, of said Daniel

B. Fayerweather were not such, except the writing executed upon November 11th, 1890.

The said Will without the codicils was admitted, but not duly admitted to probate by the Surrogate of the County of New York on or about the 24th day of February, 1891; and the said codicils, Exhibits B, C, D, and E, were admitted, but not duly admitted to probate by the Surrogate of the County of New York, and the decree, adjudging the said instruments to have been properly executed, and admitting the same to probate, and establishing the same, together with the said last Will and testament, as a Will of real and personal prop
449 erty, and directing that the same be recorded, and that letters testamentary issue thereon, to the executors therein named, was procured by fraud, suppression and evident perjury, and subornation of perjury by defendants therein, without this defendant, entered in the office of the Clerk of the said Surrogate upon the 24th day of March, 1891, and thereafter upon 25th day of March, 1891, letters testamentary were issued by said Surrogate upon the decree so presented to the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan as Executors of the last Will and testament of said Daniel B. Fayerweather, deceased, and the said defendants qualified as such executors and have taken possession of all the property and estate left by said Daniel
450 B. Fayerweather. That the property and estate left by Daniel B. Fayerweather at his decease and which has come into the possession of the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, under the said last Will and testament and the codicils thereto is of the value of upwards of $6,000,000.

And that the residuary estate referred to in the tenth clause of said last Will and testament, and in the first and fifth codicils thereto was and is of the value of upwards of $3,000,000.

Said Daniel B. Fayerweather at his decease left him surviving a widow, Lucy Fayerweather, and next of kin

to wit: the complainants and the defendant, Lucy J. Beardsley, his neices.

Said Lucy Fayerweather subsequently and on or about the 16th day of July, 1892, departed this life, being then a resident of the City of New York, leaving a last Will and testament whereby among other things this defendant was appointed executor thereof, which Will and a codicil thereto was duly admitted to probate by the Surrogate of the City and County of New York to whom jurisdiction in that behalf appertained, and this defendant duly qualified and now remains such and sole executor.

The so-called ffifth codicil was executed by said Daniel
B. Fayerweather when he was at the point of death,
451 when he was no longer rational, or of sound or disposing mind; he was not able to read said codicil or to understand the import thereof. The said Vaughan excluded from his presence all persons who were interested in the disposition of said residuary estate, or could impose any restraint upon the uncontrolled domination of said Vaughan over the acts of said Daniel B. Fayerweather.

He was unable to hear or see the said codicil, or to sign the same. The act was the act and will of said Vaughan and the defendant Ritch, and not of the said Daniel B. Fayerweather.

Said defendants used the hand of said Daniel B. Fayer-
weather to sign the said codicil, but the mental act
452 was that of said Vaughan and Ritch.

Said Lucy Fayerweather was not in her life time informed or did not learn or know of the facts aforesaid respecting said codicils.

This defendant was not informed nor did not learn or know the said facts until after December 31, 1894, and refrained from bringing suit because of the pendency of another action, and the reasonable expectation of amending and securing a trial of the issues therein.

Your orator charges and alleges that your orator is entitled to receive, have and recover of and from the defendants Ritch, Bulkley and Vaughan, individually and

as executors and trustees under the last Will and testament of Daniel B. Fayerweather, deceased, and under the codicils thereof, and as trustees in their own wrong, and by operation of law and from such defendants to whom the same has come the proportionate share to which said Lucy Fayerweather was entitled of the residuary estate of said Daniel B. Fayerweather, to wit: one-half and for an accounting and payment thereof, for which he prays, and he is entitled to such herein as may upon the whole case appear to be equitable.

For all of which special as well as for general relief your orator prays.

And your orator further prays the order of this
453 Court for a writ of injunction to be issued out of this Court and under its seal commanding the other defendants and each and every of them, their respective attorneys, counsel, solicitors, agents and officers, during the pendency of this suit and permanently not to distribute, pay over, demand, receive, transfer, or part with or encumber the real or personal property received, controlled, possessed and owned, by said Ritch, Bulkley and Vaughan under or by force of their letters aforesaid, in excess of one half of the estate of Daniel B. Fayerweather which came into their hands or under their control as such executors except in conformity with the decree of this Court therein.

And your orator further prays the order of this
454 Court appointing a receiver to receive and hold, subject to the order and decree of this Court in this suit the said residuary estate of said Daniel B. Fayerweather during the pendency of this suit.

JOHN B. REYNOLDS,

Executor.

STATE OF NEW YORK, }
County of New York. } ss.

John B. Reynolds being duly sworn, deposes and says

that he is defendant, that the foregoing answer is true to the best of defendant's knowledge, information and belief.

Signed. [illegible]

Sworn to before me this 28th day of February, 1899.

Chas. H. Lott,

Notary Public,

Kings County.

455

Certificate filed in New York Co.

456

ELECTION OF HAMILTON COLLEGE TO STAND ON HER PLEA TO THE BILL.

UNITED STATES CIRCUIT COURT

For the Southern District of New York.

Lucy S. Fosdick and another,	
vs.	Complainants,
	against
Thomas G. Ryan, individually, etc., and others,	
	Defendants.

Pursuant to the order entered herein by the Honorable E. Henry Lacombe, United States Circuit Judge, upon July 14th, 1898, the defendant, the trustees of Hamilton College hereby elects that it will stand on its present 45th plea and the evidence already taken upon the issues raised upon its present plea and the application thereto and the submission thereof heretofore made to this court, dated August 5th, 1898.

Rose, Howard, Wickham & Stimson,

Solicitors for Defendants.

The Trustees of Hamilton College,

32 Liberty Street,

Borough of Manhattan,

New York.

Dec. 1901. The defendant, the University of Rochester, filed a plea to the amended bill like that of the defendant, Marietta College.

Dec. 12, 1901. The defendant, the Woman's Hospital, in the State of New York, filed a stipulation of which the following is a copy.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity, No. 6675.

459

EMMA S. FAYERWEATHER and MARY W. ACHTER, Complainants,
against
THOMAS G. RITCH and others, Individually and as Trustees and Executors of the Last Will and Testament of
460 DANIEL B. FAYERWEATHER, deceased, and of the Codicils thereto, The Woman's Hospital in the State of New York, impleaded, and others, Defendants.

Stipulation.

IT IS HEREBY STIPULATED, by and between the complainants herein and the defendant herein, The Woman's Hospital in the State of New York, that the plea and answer in support thereof filed by the defendant, Marietta College, to the amended bill of complaint herein, be held to be the plea and answer in support thereof of the defendant, The Woman's Hospital in the State of

New York, as though the same had been duly filed herein by the Woman's Hospital in the State of New York.

Dated New York, December 4th, 1901.

WILLIAM BLAIKIE,

Solicitor for the Complainant.

M. W. HOPPIN,

Solicitor for the Defendant,

461 The Women's Hospital in the State of New York.

462

REPLICATION TO PLEA AND ANSWER OF HAMILTON COLLEGE.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

463

EMMA S. FAYERWEATHER and MARY W. ACHTER, Complainants, *against* THOMAS G. RITCH and the Trustees of Hamilton College and others. 464 Defendants.	**In Equity. No. 6675.**

The complainants, the repliants for this their replication to the plea and answer of the defendant, the Trustees of Hamilton College, saving and reserving to themselves all and all manner of advantage and exception to the manifold insufficiencies of the said plea and answer for

replication thereto say, that they will aver and prove their said Bill to be true, certain and sufficient in the law to be answered unto, and that said Plea and Answer are untrue and insufficient to be replied to by complainants. Without this, that any other matter or thing in the said Plea and Answer contained, material or effectual in the law to be replied to, confessed, and avoided, traversed or denied, is true to the knowledge or belief of these complainants. All of which matters and things these Repliants are, and will be ready to aver and prove, as this Honorable Court shall direct; and humbly pray, as in and by their said Bill they have already prayed.

ROGER M. SHERMAN,
Solicitor and of Counsel for Complainants.

Replications similar to the above have been duly filed to the pleas of the defendants, the Trustees of Bowdoin College, the Trustees of Columbia College, the Trustees of Dartmouth College, Northwestern University, Marietta College, the President and Trustees of Yale College, Wesleyan University, Manhattan Eye and Ear Hospital, St. Luke's Hospital and Presbyterian Hospital to the amended bill, Thomas G. Ritch, Justus L. Bulkley, Henry B. Vaughan, Cornell University.

465

466

ORDER THAT ADELBERT COLLEGE PLEAD LIKE HAMILTON.

At a Stated Term of the United States Circuit Court for the Southern District of New York held in the Borough of Manhattan, City of New York, on the 1st day of October 1900.

467

Present—Hon. E. Henry Lacombe, Judge.

Emma S. Fayerweather and ano.,
Complainants,
against
Thomas G. Ritch and ors.
Defendants.

John B. Reynolds as Executor,
468 Complainant,
against
Thomas G. Ritch and others,
Defendants.

The pleas herein filed by the defendant, The Adelbert College of the Western Reserve University to the amended bill and to the cross bill herein coming on to be heard upon objections taken thereto, now after hearing William Blaikie, Esq., and Roger Sherman, Esq., of counsel for the complainants, and William Ford Upson Esq., for the defendant

It is ordered that the said pleas be, and the same hereby are, overruled for duplicity.

That the defendant be deemed to have filed amended pleas to the said bill and cross bill identical in form with the plea filed to the said amended bill by the defendant The Trustees of Hamilton College, and that the said complainants be deemed to have filed replications thereto identical in form with those filed by them to the said plea of the said defendant the Trustees of Hamilton College.

That the record herein taken upon the issues raised by the said plea of the said defendant the Trustees of Hamilton College be deemed to be the record upon the
469 issue raised by the said plea of the said defendant Adelbert College.

E. HENRY LACOMBE,

U. S. C. J.

470

ORDER THAT UNION THEOLOGICAL SEMINARY PLEAD LIKE HAMILTON.

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held at the United States Court Rooms in the City of New York, on the 31st
471 day of August, 1900.

Present—Hon. E. Henry Lacombe, Judge.

Emma S. Fayerweather and another,
Complainants,
against
Thomas G. Ritch and others,
472 Defendants.

Exceptions having been filed by the complainants to the plea filed herein by the defendant upon the Union Theological Seminary to the amended bill of complaint, and the said exceptions having come on for hearing, now, after hearing Mr. Roger M. Sherman for the complainants, and Mr. William B. Putney and Mr. James L. Bishop on behalf of The Union Theological Seminary:

IT IS ORDERED, that the exceptions to said plea be and the same are hereby sustained upon the ground that the same is bad for duplicity, in that it sets up two pleas in bar, and said plea is hereby overruled with leave to the

said defendant to file an amended plea in the form of the plea heretofore filed by the defendant Hamilton College to the amended bill of complaint, within twenty days after the entry of this order, and that said plea so filed be considered as a first dilatory pleading, and in the event of its being overruled, the party interposing it will be allowed to answer.

IT IS FURTHUR ORDERED that upon filing such amended plea, the record taken upon the replication to the plea of Hamilton College to the amended bill shall be taken as and for the record under the issues thus raised.

473 E. HENRY LACOMBE,

U. S. C. J.

The above order was filed Sept. 10th, 1900. Upon the same day a similar order was entered as to the defendants the Trustees of Amherst College, and one as to the defendant the Trustees of Williams College.

And September 25th, 1900, the following stipulation was filed as to the defendant Williams College, and upon the same day a similar stipulation was filed as to the defendant Amherst College.

474

STIPULATION THAT WILLIAMS COLLEGE ADOPTS PLEA LIKE HAMILTON'S TO THE AMENDED BILL.

CIRCUIT COURT OF THE UNITED STATES.

475

EMMA S. FAYERWEATHER and MARY W. ACHTER,

Complainants,

against

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually, and as Trustees and Executors of the last Will and Testament of DANIEL B. FAYERWEATHER, deceased, and the Codicils thereto, and others,

476 Defendants.

An order having been made and filed herein on the 10th day of September, 1900, whereby the defendant, the President and Trustees of Williams College were given leave to file an amended plea in the form of the plea heretofore filed by the defendant, the Trustees of Hamilton College to the amended bill of complaint.

It is hereby stipulated and agreed that the plea and answer heretofore filed by the defendant, the President and Trustees of Williams College, be taken and stand in all respects as the plea and answer of the defendant, the

President and Trustees of Williams College, to the amended bill of complaint herein, with the same force and effect as though a plea had been filed, as provided in the said order of September 10, 1900; but the said plea of the Trustees of Hamilton College as being the plea and answer of the President and Trustees of Williams College is to be regarded and deemed to be so amended as to constitute the name "President and Trustees of Williams College," wheresoever it appears in the said plea of Hamilton College, and the names of Putney, Twombly and Putney as solicitors for the defendant, the President and Trustees of Williams College shall be deemed to be attached to the said plea as so amended and filed and
477 in all other respects said order of September 10th, 1900, shall be applicable to the substituted record.

The appellant from any decree need not print the record in the "Five College action" in any other or in this Court.

Dated September 25th, 1900.

PUTNEY, TWOMBLY & PUTNEY,

Attorneys for President and Trustees of Williams College.

ROGER M. SHERMAN,

Solicitor for Complainants.

478 Similar stipulations were filed at the same time as to defendants. Trustees of Amherst College and the Union Theological Seminary.

Replications similar to that to the plea of Hamilton College to the amended bill have also been filed to the pleas of the University of Rochester and of the Women's Hospital.

ORDER THAT LAFAYETTE COLLEGE PLEAD TO AMENDED BILL LIKE HAMILTON; AND THAT COMPLAINANTS BE TAKEN TO HAVE DULY FILED REPLICATION THERETO.

At a Stated Term of the Circuit Court of the United States for the Southern District of New
479 York, held at the Post Office Building in the City and County of New York, on the 6th day of March, 1901

Present—Hon. E. Henry Lacombe, Circuit Judge.

Emma S. Fayerweather and another,

Complainants,

against

Thomas G. Ritch, *et al.*, individually and as Executors
480 and Trustees of the last Will and Testament of Daniel B. Fayerweather, deceased, and others,

Defendants.

The defendant, Lafayette College, having been given leave by a former order made in this cause to withdraw its plea and answer to the bill of complaint as amended in the above entitled cause, and to substitute therefor a plea and answer similar to the plea and answer of the defendant the Trustees of Hamilton College, and having

therefore withdrawn its said plea and answer; and upon reading and filing the annexed consent of Roger M. Sherman, Esq., Solicitor for the Complainants, on motion of Swayne, Swayne, Morris & Fay, Solicitors for the Defendant, Lafayette College;

ORDERED, That the said defendant, Lafayette College, be taken to have filed the same bill and answer which the Trustees of Hamilton College have to the bill of complaint as amended, and that the complainants be taken to have filed a like replication thereto as fully for all intents and purposes as if such bill and answer
481 and replication thereto were actually printed and filed now as if the same had been done at the November Rule day, 1900.

FURTHER ORDERED, That the complainants be taken to have taken and filed, on the plea and answer of Lafayette College, and the replication thereto, the same testimony taken by them on the plea and answer of Hamilton College, or any of the other pleas in this case; and that the said defendant, Lafayette College, be taken to have taken and filed the same testimony taken on behalf of the defendant, the Trustees of Hamilton College on its plea and answer, or of any of the other defendants in support of any of their said pleas and answers, all of
482 which testimony so taken or which may hereafter be taken in this cause to be used upon the determination of the plea and answer of said defendant, Lafayette College, and the replication thereto as fully for all intents and purposes as though the same had been taken upon the issues joined upon said plea and answer; each of said parties to have the right to insist on any and all proper objections to said testimony or any part thereof where objection was formally taken at the time.

AND IT IS FURTHER ORDERED, That the withdrawing by the said defendant, Lafayette College, of the plea and answer to the bill of complaint as amended shall

be without prejudice to such right as it may have hereafter to insist by way of answer on any matters and things set forth in the plea and answer so withdrawn, but not in the plea and answer which it shall so be taken to have filed.

E. H. Lacombe,

U. S. C. J.

I hereby consent to the entry of the above order.

New York City, March 6th, 1902.

Robert M. Sherman,

Solicitor for Complainant.

204

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

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[illegible]

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[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

The continued taking of this testimony would be a hardship to defendants, were it not that complainant has offered to stipulate that opposing counsel need not attend to register objections, to reserve objections to the testimony, but may raise such objections after the testimony is taken, and before the record is made up for argument.

This certainly makes the archaic, cumbersome and unsatisfactory method of taking testimony in equity in the Federal Courts as little of a burden to defendants as it can be made.

487

In view of the decision in Blease *vs.* Garlington this Court seems powerless to afford any greater measure of relief. The profferred stipulation is allowed and motion denied.

Filed Oct. 7, 1898.

488

OPINION OF LACOMBE, J., THAT THE WITNESS BUTLER SHOULD DIVULGE THE CONTENTS OF THE BURNED CODICIL.

UNITED STATES CIRCUIT COURT,

489 SOUTHERN DISTRICT OF NEW YORK.

FAYERWEATHER *et al.*
vs.
RITCH *et al.*

APPLICATION TO COMPEL A WITNESS TO ANSWER QUESTIONS CERTIFIED BY THE EXAMINER, SITTING TO TAKE TESTIMONY IN EQUITY.

490

One of the issues upon which complainant is seeking to put in proof is as to the destruction of a document, executed by a deceased testator and known as "the fourth codicil," and complainant is seeking to show the contents of such codicil, which he contends was duly executed by testator in the presence of subscribing witnesses.

The witness under examination, is the counsel of deceased who took his instructions for the preparation of the codicil, drew it up, and delivered it to the testator, and apparently saw him execute it. Presumably he is able to testify what were the contents of the document (since destroyed) and so far as appears, no other witness is able to do so.

The witness declines to testify to the contents of the document, contending that his lips are sealed as to communications with his client, both by well recognized principles of jurisprudence, and by the Statute of the State of New York.

Lacombe, *Circuit Judge.*

It is a sound public policy which provides that an attorney or counsel should not be allowed to testify to any of the transactions or conversations between himself and his client which led up to the preparation of any document.

But when the document, be it a will, or contract,
491 or what not, has been executed, its contents are no longer confidential, the reason for the rule ceases, and the counsel may as properly testify to the contents as may any other witness who knows such contents.

The Statute of the State of New York provides (Code of Civil Procedure, Sec. 835) that "An attorney or counsellor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment."

At the time the cause hereinafter referred to was before the courts, the next section, 836, provided that, "Sec. 836. The last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the pa-
492 tient, or the client."

While the statute stood thus, the case of *In re* Coleman came before the Court of Appeals, 111 N. Y. 220.

Counsel who had prepared the will of deceased under instructions from him, and who had subsequently at his request, signed the attestation clause as witnesses, were allowed to testify to the circumstances attending its execution, including the condition of his mental faculties at that time. This was upon the theory that the request to witness his will was a waiver of the privilege which the Statute conferred. The language of the Court was broad enough to warrant the finding of a like waiver as to the

mere contents of the document, in the execution of the instrument by the deceased.

"It would" says the Court, "be contrary to settled rules of law to ascribe to the testator an intention, while making his will, and going through the form required to make it a valid instrument, to leave in operation the provisions of a statute which he had power to waive, but which, if not waived, might frustrate and defeat the whole object of his action." And certainly the whole object of the testator's action would be destroyed if his executed will, being by some accident destroyed, the only witness who could testify to its contents was for-
493 bidden to testify thereto.

Since the Coleman Case the Statute (Sec. 836) has been amended so that it now reads, "Sec. 836. The last three sections apply to any examination of a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient, or the client.

But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate, or hereafter to be executed or offered for probate, from becoming a witness, as to the preparation and execution, in case such an attorney is one of the subscribing witnesses thereto."

494 But, even in their present form, the two sections (835 and 836) taken together, seem not to be applicable to the cause at Bar, provided the testimony sought to be elicited from counsel is strictly confined to the statement of the contents of a document which ceased to be be confidential when it was executed.

The execution of a document however, does not make the transactions and conversations between counsel and client which led up to the execution any the less confidential, and as to such transactions and conversations there is no express or even implied waiver.

The privilege covers also all conversations and transactions with the client's agent or intermediary.

The witness therefore should answer if he knows, as to whether or not a paper prepared by himself as counsel, was in fact signed by deceased in the presence of attesting witnesses, in the form and manner required to constitute a valid publication of such a paper as a testamentary document; and, if he knows, or as far as he knows, he should state the contents of such published document if he testify that the document was, in fact, thus published.

The objections to all other questions enquiring as to conversations and transactions with his client or his client's agent, leading up to the preparation and execution of such document are sustained.

495 The case of Glover *vs.* Patten, 165 U. S., 394, has not been overlooked, but it does not seem to be controlling to a contrary decision."

October 22, 1898.

496

OPINION OF WALLACE, J., REVERSING DECISION OF LACOMBE, J., THAT THE WITNESS BUTLER SHOULD DIVULGE CONTENTS OF BURNED CODICIL.

Federal Reporter, Volume 91, Page 451.

497

BUTLER
vs.
FAYERWEATHER, *et al.*

Wallace, *Circuit Judge.*

This is a writ of error to review an order committing
498 the plaintiff in error for contempt, in default of answering certain questions propounded to him as a witness in an equity cause pending in the court in which the order was made.

The witness was not a party to the cause, and based his refusal to answer the questions upon the ground of privilege, he being an attorney, and asserting the question to call for professional communications of his clients.

It is insisted for the defendant in error that the order cannot be reviewed upon a writ of error, but only upon appeal from a final decree in the cause in which it was made. This court in Gould *vs.* Sessions, 35 U. S., App. 281, 14 C. C. A. 366, and 67 Fed. 163, held a contempt of

court to be a criminal offense, and an order imposing a fine therefor to be a judgment reviewable by writ of error at the instance of the party aggrieved.

It was determined in Crosby's Case, 3 Wils. 188, and declared by the Supreme Court in *Ex parte* Kearney, 7 Wheat 38, that an adjudication for a contempt was a conviction, and a commitment in consequence an execution. In New Orleans *vs.* Steamship Co. 20 Wall, 362, the Supreme court said:

"Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the
499 residue as if it were a judgment upon an indictment for perjury committed in a disposition read at the hearing."

In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, the defendants in an equity cause were committed for contempt, for the violation of a preliminary injunction restraining them from committing the acts to enjoin which the suit was brought, and upon an application to the Supreme Court for a writ of error, the writ was denied upon the ground that the order of committal was not a final judgment or decree.

That was a case in which the propriety of the order could have been reconsidered by the court which made it a final decree, and, being an interlocutory order
500 in the progress of the cause, could only be reviewed by the Supreme Court upon an appeal from the final decree. The case is quite different, however, when a person not a party to the cause is imprisoned or fined for contempt. The order proceeds upon a matter distinct from the general subject of the litigation. The aggrieved party has no opportunity to be heard when the cause is before the court at final hearing, and, as to him, the proceeding is finally determined when the order is made. Not being a party to the cause, he could not be heard on an appeal from a final decree; and unless he can be heard by writ of error, he has no review, but must submit to the determination of the court below, if the court has

jurisdiction, however unwarranted it might be by the facts or the law of the case.

It would be a reproach to the administration of justice if the statutes of the United States, conferring appellate jurisdiction upon this court to review all final decisions of the circuit court, failed to provide any means of review to the citizen who had been deprived of his liberty, or required to pay a fine without just cause.

We think the power conferred extends to a case like the present.

Whenever, in a cause, there is a determination of some question of right, a decision is final, in the sense in
501 which an appeal from it is permitted, if it decides and disposes of the whole merits of the cause as between the parties to the appeal, reserving no further questions or directions for the further judgment of the court, so that to bring the cause again before the court for decision will not be necessary.

> Mackeye v. Mallory (decided by this court Feb. 23, 1897), 24 C. C. A. 420, 79 Fed. 1; Rouse *vs.* Hornsby, 14 C. C. A. 377, 67 Fed. 219; Gumbel *vs.* Pitkin, 113 U. S., 545, 5, Sup. Ct. 616; Central Trust Co. *vs.* Grant Locomotive Works, 135 U. S., 207, 10 Sup. Ct. 736.

502 Upon its merits, the appeal presents the question whether an attorney who has prepared a codicil to a will alleged to have been executed and published by the testator, his client, and fraudulently destroyed by one of executors named in a subsequent codicil, can be required to disclose its contents, and whether it was signed by the testator in the presence of attesting witnesses, in form and manner to constitute a valid publication; the attorney being present at the time of the alleged publication, but not being an attesting witness. Irrespective of the effect of the Statute of this state the question would be free from doubt. The rule of evidence, which forbids an attorney, without the consent of his client, to

disclose communications made to him professionally by the client, applies generally to the contents of documents intrusted to him, unless he is a subscribing witness, whether the documents are evidence of title, formal instruments, or merely letters of memoranda. 2 Tayl. Ev. 911–936. If he has attested an instrument for his client, the professional relation is thereby abandoned *pro hac vice* and he may be compelled, not only to prove its execution but all that passed at the time.

An exception to the general rule exists in the case of testamentary dispositions (1 Whart. Ev. 591), upon the principle that the disclosure can affect no right or in-
503 terest of the client. In Blackburn *vs.* Crawfords, 3 Wall. 175, it was held that an attorney who drew a will could testify as to statements made by the testator about the legitimacy of his children and his relations to their mother, made in interviews between him and the attorney, preceding and connected with the preparation of the will. In Glover *vs.* Patten, 165 U. S. 394, 17 Sup. Ct. 411, it was held in a suit between devisees under a will that statements made by the testator to counsel respecting the execution of the will or of similar documents were not privileged.

By section 858 of the Revised Statutes of the United States the laws of the state in which the court is held are the rules of decision for the courts of the United States
504 as to the competency of witnesses in equity causes as well as in trials of common law; and, as construed by the Supreme Court in its latest utterances upon the subject, this provision supplies the criterion of the competency of evidence as well as the competency of the witnesses.

Connecticut Mut. Life Ins. Co. *vs.* Union Trust Co., 112 U. S. 250–255, 5, Sup. Ct. 119; Insurance Co. *vs.* Robinson, 19 U. S., App. 266, 7 C. C. A. 444 and 58 Fed. 723.

In this state the common law rules of evidence in respect to privileged communications have been materially changed by code Civ. Proc. 835, 836.

Whether these changes were inconsiderate, and due to hasty and superficial legislation or whether they were made with a deliberate purpose to seal the lips of witnesses in cases where the courts had refused to do so, it is unnecessary to inquire.

The statute must be given the effect which its language requires. Originally the Code merely provided that an attorney or counsellor at law should not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment unless that provision should be "expressly waived by the client." The statute came before the
505 Court of Appeals of New York for construction in two cases decided in 1888.

> *In re* Coleman's Will, 111 N. Y., 220, 19 N. E. 71, and Loder v. Whelpley, 111 N. Y. 239, 18 N. E. 874.

In both of these cases it was held that the prohibition of the Code precluded the disclosure of instructions given by a testator to an attorney employed to draw his will; but in Coleman's Case it was held that, where the attorney became the attesting witness to the will, at the request of the testator, the prohibition was "expressly waived," within the meaning of the Code, and the
506 attorney was competent to testify as to all the circumstances attending the execution of the instrument.

Thereafter the Code was amended so that the prohibition should apply unless "expressly waived upon the trial," by the client, but should not disqualify an attorney "in the probate of a will" from becoming a witness "as to its preparation and execution," if one of the subscribing witnesses thereto.

As the statute now reads, no act of the client, except a waiver upon the trial, can be treated as a waiver of the prohibition of the disclosure; and except he is an attesting witness to a will, in no case is an attorney permitted to make disclosure in respect to the contents of any docu-

ments or other information communicated to him in the course of his professional employment by the client.

It follows that the plaintiff in error properly declined to disclose the contents of the codicil or testify to the declarations of the testator attending its execution.

The circumstances that other witnesses were present at the time when the codicil is alleged to have been executed and published, even though they heard all that took place and were aware of the contents of the instrument, is wholly immaterial. Under such circumstances the other witnesses are permitted to testify to the communications which pass between client and attorney.

507 Jackson *vs.* French, 3 Wend, 337; Hoy *vs.* Morris, 13 Gray, 519; People *vs.* Buchanan, 145, N. Y., 1 38 N. E. 846.

Nor does the circumstance that the complainants may be able to prove that the codicil was fraudulently destroyed by one of the persons who was appointed an executor of the will by a subsequent codicil, deflect the operation of the rule against disclosure by the attorney.

Probably the statute is not to be construed as intended to apply to cases of fraud contrived by the client and solicitor in concert, or to communications between them made in the course of a criminal scheme. Before the statute the privilege did not apply to all communica-
508 tions betwen client and attorney, but only to such as passed between them in professional confidence; and the courts generally repudiated the proposition that the contriving of a fraud, or the conniving in a crime could form a part of the professional occupation of an attorney or counsel.

There is no pretense in this case that the codicil or anything which took place at the time of its alleged publication was of a fraudulent or criminal nature.

We conclude that the order of the court below was an erroneous exercise of power, and it is therefore reversed.

OPINION OF LACOMBE, J., ALLOWING BILL TO BE AMENDED.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

509

EMMA S. FAYERWEATHER AND ANO,
vs.
THOMAS G. RITCH AND ANO.

MOTION TO AMEND BILL OF COMPLAINT.

510

LACOMBE, *Circuit Judge.*

The motion to amend is granted as prayed.

This practically reopens the whole case.

All parties defendant may have twenty days after service of the Amended Bill to plead answer or demur thereto.

The case being thus reopened a plea of demurrer if interposed, will be considered as a first dilatory pleading; in the event of its being overruled a party interposing it will be allowed to answer.

The defendants Trustees of Hamilton College may have twenty days to elect whether it will plead answer or demur to the Amended Bill, or whether it will stand on the evidence already taken upon the issues raised by its present plea, replication there to and submission thereof heretofore made to this Court.

Filed June 26, 1899.

511

512

OPINION OF LACOMBE, J., SUSTAINING CERTAIN PLEAS DISMISSING BILL AND CROSS-BILL AS TO CERTAIN DEFENDANTS; AND OVERRULING PLEAS OF AMHERST, WILLIAMS, AND UNION THEOLOGICAL SEMINARY.

513

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FAYERWEATHER WILL CASES.

514

LACOMBE, *Circuit Judge.*

The pleas of defendant to the Amended Bill and Cross Bill are sustained, and the amended and cross bill dismissed as to the following defendants:

Lafayette College, Cornell University, Marrietta College, Thomas G. Ritch, Adelbert College, Justus L. Bulkley, Henry B. Vaughan, Bowdoin College, Yale College, Wesleyan College, Manhattan Eye and Ear Hospital, Darthmouth College, Presbyterian Hospital and St. Luke's Hospital.

In conformity with the views expressed in Fayerweather *vs.* Trustees of Hamilton College, decided to-day, the ex-

ceptions to the pleas of Amherst College, Williams College and Union Theological Seminary for duplicity are sustained.

They set up an additional adjudication of the Surrogate as well as the adjudication in the five College suit which is set up in all the pleas.

Filed July 12, 1901.

515

516

OPINION OF OF LACOMBE, J., SUSTAINING PLEA OF HAMILTON COLLEGE UNDER CONSTRAINT.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

517

EMMA S. FAYERWEATHER AND MARY W. ACHTER
vs.
The Trustees of Hamilton College, The Executors of Daniel B. Fayerweather Impleaded with Others.

In Equity, No. 6675.

518

Hearing on Complaints, Pleadings and Proofs to the plea of the Trustees of Hamilton College to the bill of complaint and the pleas of same to the cross bill.

Careful examination of the ingenious and exhaustive brief submitted in support of the bill and cross bill has failed to convince the court that so far as the merits of the controversy presented by these pleadings are concerned the pleas are not sound and supported by the proofs.

It is constrained so to hold by the decision of the Cir-

cuit Court of Appeals upon appeal from the order of injunction.

It may be difficult to follow the reasoning by which that court reached the conclusion, that there had been an adjudication sustaining the proposition that the releases executed by the widow and next of kin were valid and not procured by fraud; but that conclusion was certainly reached, and was expressed with no uncertain sound.

No doubt the ultimate result of the litigation in the State Courts has been by refined technicalities, to
519 render inoperative so far as this estate is concerned the provisions of a statute which seems to be the conception of a wise and commendable public policy.

That circumstances however is immaterial.

As the Court of Appeals expresses it, "Even if there had been a miscarriage of justice (the parties) must submit."

Since the former appeal the complaint has been amended, and a cross bill served whereby relief is sought not only to impugn the probate of the will and its codicils so far as they were admitted to probate, but also to estab-
520 lish a codicil alleged to have been unlawfully destroyed, and if no valid will can be established to administer and dispose of the estate as in case of intestacy.

But this does not in any way change the situation. The releases bear date subsequent to the transactions on which this prayer for relief is predicated, and if valid, is a fatal bar to any part of the relief asked for, whether the adjudication in the State Court would or would not be a bar to relief to the additional matter charged in the Amended bill and in the cross bill the relief is as effectual a bar to the new matter as it was to the old matter set up in the bill as it stood on appeal to the Court of Appeals.

The plea does not set up the release in bar; but it does set up the proceedings in the State Court, which the Circuit Court of Appeals has held to constitute an adjudication that that particular relation was made, is valid, and no longer open to attack.

Both releases and adjudication are proved, and under the decision of the appeal from injunction, there is nothing to do except sustain the pleas and dismiss the bill and cross bill.

Under these circumstances the Court will not be as-
521 tute to find errors of form in the plea.

The plea in this case is not double; it sets up the record of but a single suit as an adjudication, although the decisions of the court of original jurisdiction and of the successive appellate tribunals are disposed of, that suit together makes up the adjudication on which the defendant relies. As to lack of a corporate seal to the plea, the language of the Equity rule 31, requires that a plea "be supported by the affidavit of the defendant that it is not interposed for delay, and that it is true in point of fact." This requirement seems to be comprehensive, and when the plea of a corporation is thus verified, the affixing of its coporate seal to the plea may be dispensed with.
522

Filed July 12, 1901.

May 26th, 1902, Lacombe, J., made an order as to what pleas and records both to the amended and Reynolds cross bills should be deemed adopted by the various defendants, which order will be found in Appendix of Exhibits as Exhibit No. 100.

IN THE UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

CROSS BILL OF DEFENDANT, JOHN B. REYNOLDS, AS SOLE EXECUTOR OF THE LAST WILL OF LUCY FAYERWEATHER, WIDOW OF DANIEL B. FAYERWEATHER, DECEASED.

In Equity No. 6675. Cross Bill of Complaint.

523

JOHN B. REYNOLDS, as Sole Executor of the Last Will and Testament and Codicil of Lucy Fayerweather, deceased,

COMPLAINANT

against

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually, and as Trustees and Executors of the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the Codicils thereto; Emma S. Fayerweather, Mary W. Achter, Anner A. Reynolds, Lucy J. Beardsley, Joshua M. Fiero, the Trustees of Amherst Col-
524 lege, the Trustees of Dartmouth College, the Trustees of Hamilton College, the University of Rochester, the President and Trustees of Bowdoin College, the Union Theological Seminary in the City of New York, Cornell University, the Trustees of Union College in the town of Schenectady, in the State of New York, the Rector and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, the Adelbert College of the Western Reserve University, Park College, Northwestern University, the Mount Sinai Hospital, the Presbyterian Hospital in the

City of New York, the Woman's Hospital in the City of New York, the Manhattan Eye and Ear Infirmary in said city, St. Luke's Hospital in the City of New York, Wesleyan University at Middletown, Connecticut, Lafayette College at Easton, Pa., Maryville College, Trinity College, at Hartford, Conn., Wabash College, Marietta College, the President and Fellows of Yale College in New Haven, Conn., the Trustees of Columbia College in the City of New York, and the Randolph and Macon College at Boydton, Mecklenburg County, Virginia.

525 DEFENDANTS.

To the Judges of the Circuit Court of the United States, for the Southern District of New York.

John B. Reynolds, as sole executor of the last will and testament and the codicil thereto of Lucy Fayerweather, deceased, brings this his cross bill of complaint against Thomas G. Ritch, individually, and as executor of the alleged last will and testament of Daniel B. Fayerweather, deceased, and of the codicils thereto, and as trustee thereunder, a citizen of the State of Connecticut.

Justus L. Bulkley, individually, and as executor of the alleged last will and testament of Daniel B. Fayerweather, deceased, and of the codicils thereto, and
526 as trustee thereunder, a citizen of the State of New York, and an inhabitant of said district.

Henry B. Vaughan, individually, and as executor of said alleged will and codicils, and as trustee thereunder, a citizen of the State of New Jersey.

The Union Theological Seminary, in the city of New York, a domestic corporation, organized under the laws of the State of New York, and an inhabitant of said District, The Mt. Sinai Hospital in the city of New York, the Presbyterian Hospital in the City of New York,

the Woman's Hospital in the State of New York, the Manhattan Eye and Ear Infirmary in said city, St. Luke's Hospital in the City of New York, the Trustees of Columbia College in the city of New York, all of which are domestic corporations organized under the laws of the State of New York, and inhabitants of said District.

The Trustees of Amherst College, a foreign corporation organized under the laws of the Commonwealth of Massachusetts.

The President and Trustees of Williams College, a
527 foreign corporation organized under the laws of said Commonwealth.

The Trustees of Dartmouth College, a foreign corporation organized under the laws of the State of New Hampshire.

Wesleyan University at Middletown, Connecticut, and the President and Fellows of Yale College, in New Haven, Connecticut, and Trinity College, which are foreign corporations organized under the laws of the State of Connecticut.

Lincoln University and Lafayette College, which are foreign corporations organized under the laws of the State of Pennsylvania.

The Adelbert College of the Western Reserve Uni-
528 versity and Marietta College, which are foreign corporations organized under the laws of the State of Ohio.

Wabash College, which is a foreign corporation organized under the laws of the State of Indiana.

The North Western University, which is a foreign corporation organized under the laws of the State of Illinois.

The Rector and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution and The Randolph and Macon College at Boydton, Mecklenbury County, Virginia, which are foreign corporations organized under the laws of the State of Virginia.

Maryville College, which is a foreign corporation organized under the laws of the State of Tennessee.

Park College, which is a foreign corporation organized under the laws of the State of Missouri.

The Trustees of Hamilton College, the University of Rochester, the Trustees of Union College, in the town of Schenectady in the State of New York and Cornell University, which are domestic corporations organized under the laws of the State of New York.

Bowdoin College, a foreign corporation organized under the laws of the State of Maine.

Emma S. Fayerweather and Mary W. Achter, who
529 are citizens and inhabitants of the State of Iowa.

Joshua M. Fiero, a citizen of the State of New York and an inhabitant of said district.

Anner Amelia Reynolds and Lucy J. Beardsley, citizens of the State of Connecticut.

And thereupon your orator complains and says that:

Your orator is sole executor of the last will and a codicil thereto of Lucy Fayerweather, deceased, by force of certain letters testamentary, duly granted unto him on or about the 9th day of September, 1892, by the Surrogate of the City and County of New York, where said Lucy Fayerweather was domiciled and resided, at the time of her death, said Surrogate having jurisdiction in the premises.

That your orator has duly qualified as and remains such executor.

530 The said defendants, as your orator is informed and believes, are respectively citizens and inhabitants as hereinbefore set forth and described.

There was filed in the said Circuit Court of the United States for the Southern District of New York, on or about the 1st day of June, 1897, a certain bill of complaint, wherein, the defendants Emma S. Fayerweather and Mary W. Achter are complainants and your orator, and the foregoing defendants herein, except said Joshua M. Fiero, and the said Randolph and Macon College at

Boydton, are defendants. Several answers have been filed thereto by some of said defendants, the time to reply to which has not yet expired. The time of this complainant to answer said bill has not yet expired, and as to said defendants, said cause is not yet at issue.

Certain others of said defendants are in default for want of answers; while the defendants, the Trustees of Hamilton College, have filed a plea to said bill, upon which issue has been joined by the replication of the complainants thereto, and the time for taking of testimony thereunder has not yet expired.

531 The object of said bill of complaint is to secure the payment to complainants, and others, including your orator, upon grounds therein stated, of the residuary estate of Daniel B. Fayerweather, deceased, amounting to about $3,100,000, and to obtain a decree for the cancellation of certain releases and the avoidance of certain decrees of the Surrogate's Court of the county of New York and of certain judgments of the Supreme Court of the State of New York, as colorable clouds upon the title to said residuary estate of said complainants and others; all of which relief is therein prayed.

The testatrix, Lucy Fayerweather, of whose will and codicil your orator was appointed and remains executor, as aforesaid, was the widow of said Daniel B. Fayerweather and survived him, and as such was entitled to three-sixths of said residuary estate.

532 But the grounds upon which she was so entitled are not in said bill set forth truly and entirely, and the remedies, redress, prayers and relief therein demanded, are not so alleged and supported, to the best of the knowledge, information and belief of your orator, as to entitle him to such relief by answer under said bill as he can obtain by cross bill; and he is entitled to redress and relief as between himself and other defendants in said bill as will more fully hereinafter appear. This he can, by the settled practice in equity, obtain, only by a decree upon this, his cross-bill of complaint which he brings and files accordingly.

Further complaining, your orator further alleges:

There was at the filing of said bill of complaint herein, within the jurisdiction of this court and within the Southern District of New York, real and personal property, the estate of Daniel B. Fayerweather, of which he died, seized and possessed to the amount and of the value of upwards of six millions of dollars.

Said estate by operation of law, was and became on the 15th day of November, 1890, upon the death of said Daniel B. Fayerweather which occurred on that day in the City of New York where he had theretofore resided,

as to one-half thereof, by virtue of the last will and
533 testament, hereinafter described, executed on the 2d
day of October, 1880, vested in executors therein named, for the uses, and with the powers hereinafter set forth, and as to the rest and residue thereof, amounting to $3,100,000, said estate, then and there, by operation of law was and became the property of Lucy Fayerweather, as the widow of said Daniel B. Fayerweather, the testatrix of this complainant, together with the defendants Emma S. Fayerweather, Mary W. Achter and Lucy Beardsley, who were then and there nieces and only next of kin of said Daniel B. Fayerweather, the share and interest thereof of said Lucy Fayerweather, amounting to three-sixths of said residuary estate, said residu-

ary estate being then and there property not devised
534 as more fully appears by the said will, a copy of
which is hereunto annexed, and marked Exhibit A.

The institutions in the 9th and 10th clauses of said will mentioned were all charitable and literary corporations.

On or about the 24th day of February, 1891, there was admitted to probate by the Surrogate of the County of New York a paper purporting to be the last will and testament of said Daniel B. Fayerweather, and on or about the 24th day of March, 1891, four certain alleged codicils to said pretended will, which are the same hereinafter described, were likewise admitted to probate, and a decree or decrees entered in said Surrogate's court on or

about the 24th day of March, 1891, adjudging said papers to have been duly executed, and published and establishing the same as a will of real and personal property, and directing that the same be recorded, and that letters testamentary issue thereon to the defendants, Thomas G. Ritch, Justus L. Buckley and Henry B Vaughan, as executors of the last will and testament of said Daniel B. Fayerweather, deceased; and letters testamentary were issued to them accordingly, and said defendants, under color thereof, have taken possession of all the property and aforesaid estate left by said Daniel B. Fayerweather,

and now hold the same or have misapplied the same
535 to their own uses.

Said probate and decrees were procured and obtained by said defendants Ritch, Bulkley and Vaughan acting in concert with the other defendants herein, except said defendants Emma S. Fayerweather, Mary W. Achter, Anner Amelia Reynolds, Joshua M. Fiero, Lucy Beardsley and the Randolph and Macon College, and by the aid, procurement and connivance of said other defendants, by the intimidation, duress, suppression of the truth, misrepresentation, fraud and abuse of position, power and opportunity hereinafter set forth, practised upon said Lucy Fayerweather, whereby and in pursuance of which, without any consideration and not otherwise, she was induced to acquiesce in the probate of the said alleged will and to execute, sign and deliver two certain

writings, copies of which are hereunto annexed and
536 marked respectively, Exhibits B and C.

Upon said acquiescence and upon said writings, the said decrees of said Surrogate's Court were obtained and entered by said defendants.

Said defendants Thomas G. Ritch and Henry B. Vaughan, prior to the probate of said alleged will held out to said Lucy Fayerweather and pretended that said will was the last will and testament of said Daniel B. Fayerweather and that it was necessary that it should be immediately admitted to probate to enable them to make provision thereunder for her necessities of life, and other

provision made for her comfort and maintenance by her husband; and she being ignorant that the said will was not the last will of her said husband as hereinafter alleged, and that the said Exhibit A and other instruments herein alleged to be his last testamentary papers, were such, and believing said representations, consented to and acquiesced in said probate.

The said Lucy Fayerweather, however, duly objected to the probate of four certain alleged codicils to said said alleged will for various reasons, and thereupon said defendants (with the exceptions aforesaid), through and by the said Ritch, Bulkley and Vaughan, withheld
537 from said Lucy Fayerweather, the necessities of life, and the provision which her husband had made for her maintenance and comfort, and compelled her to live upon credit and borrowed money, meantime threatening to continue so to withhold the said provision and to expend the entire estate in litigation, unless she would cease her contest and execute said papers Exhibits B and C.

Said Ritch, Bulkley and Vaughan then and there represented to her that they were residuary legatees of said estate in their own right under valid provisions in said codicils, denying, although they well knew the contrary to be the truth, that she had any right, title or interest in said residuary estate.

The said Lucy Fayerweather was then suffering from a mortal disease, as the said defendants well knew, and her strength, judgment, firmness and resolution were so
538 impaired, and her distress of mind was so great, that she was by reason of the premises coerced and intimidated into executing said Exhibit B and C, and into withdrawing her opposition to the probate of said codicil.

During the life of said Lucy Fayerweather she was not aware and did not know the facts hereinafter stated, concerning the will of 1880 (Exhibit A), or affecting the will of 1884 and its alleged codicils hereinafter stated.

As part of the consideration and inducement held out and offered by said defendants to procure the execution of said Exhibits B and C and which moved and influenced said Lucy Fayerweather to execute the same, was a promise and agreement, then and there, by them made, that they would, in consideration of the execution thereof convey to her forthwith upon the probate of said codicil, the family burial plot and tomb in Woodlawn Cemetery, in the city of New York.

But the said defendants in violation of said agreement, upon receiving and procuring the benefit of said Exhibits B and C, and being, thereby enabled to perform said
539 agreement, conveyed and transferred said burial plot and tomb to the defendant Lucy Beardsley, which failure of consideration, of right should and did, impair and invalidate said Exhibits B and C.

Further complaining your orator further alleges:

That the said alleged last will and testament dated October 6, 1884, was not the act and will of said Daniel B. Fayerweather, but was null and void and the execution thereof was procured by undue influence, covin and fraud practiced upon the said Daniel B. Fayerweather by the defendant Thomas G. Ritch, in this, that the said Ritch, for years prior to and at the time of the execution of said alleged last will, was an attorney at law, and the legal adviser of said Daniel B. Fayerweather, and in that capacity enjoyed his confidence; that he persuaded
540 said Daniel B. Fayerweather who wished to leave his estate in violation of Chapter 360 of the Laws of New York of 1860, that is to say, to leave a greater part than one-half thereof to corporations and institutions within the prohibition of that statute, to make said will in violation of said statute, which, by the tenth clause thereof, he did, making him, said Ritch, an executor thereof with such a discretion concerning the disposition of the estate, as to enable him, said Ritch, to cœrce the beneficiaries to acquiesce in such disposition thereof as said Ritch should determine upon; which was done

accordingly as will appear from said will, a copy of which is annexed, marked Exhibit D. Further contriving for his own use and advantage to get possession of and enjoy said estate, the said Thomas G. Ritch persuaded the testator to execute a codicil to said will whereby he, said Ritch, was made a legatee of the residuary estate; and by these devices and papers the said Ritch was empowered by the exercise of the discretion conferred by the said will, Exhibit D, to throw the bulk of said estate into the residuary estate, and by force of said codicil, to become, with said Bulkley, the owner and beneficiary of nearly the entire estate.

541 It was not the intention of said Daniel B. Fayerweather to make any such will, and he executed said will and the first three codicils thereto without understanding the same or their legal effect, and relying on the advice and representations of said Ritch as his attorney, that the discretion so conferred upon said Ritch by said will and the devise to him of said residuary estate by said codicil, was a mode of effectuating the wishes of said Daniel B. Fayerweather, aforesaid, in violation of the Statute, and whereby that violation could be concealed, and the Statute successfully evaded. But said Fayerweather while seeking so to avoid said said Statute was himself defrauded by said Ritch inasmuch

Whereas, as said Ritch well knew and said Daniel B. Fayerweather was ignorant, that said discretion con-
542 ferred by the will was void, for uncertainty and otherwise, and the said devise enabled said Ritch to claim the residuary estate as his own.

Further complaining, your orator further alleges:

A few days before his death, the said Daniel B. Fayerweather first knew what the legal effect of said Exhibit D, with its codicils, was, and he then attempted to execute and to publish a codicil to said Exhibit D, whereby he sought to annul the same, in those respects,

wherein it differed from the said Exhibit A, and in substance and effect re-established said will of 1880, and divest said Ritch of all control or discretion over said estate, and removed him from the capacity of executor. Said codicil is in the possession and power of said defendant Vaughan, and the particulars thereof are well known to said defendants and are unknown to this complainant, and he therefore prays that the same may be fully disclosed, and when disclosed, if valid, and so far as valid, effectuated.

On the 15th day of November, 1890, while said Daniel B. Fayerweather was dying, and was no longer com-
543 petent to execute a will or to make any testamentary dispositions, the defendants Ritch and Vaughan procured and induced employes and agents by them thereunto instigated, to enter the dying chamber of said Daniel B. Fayerweather and, placing a pen in his hand and sustaining, supporting and guiding it, to place his name, which was by said persons, or one of them, misspelled, upon a pretended codicil which purported to reaffirm the said will, exhibit D and the first three codicils thereto, and to join said defendant Vaughan with said defendants Bulkley and Ritch, as residuary legatee of said estate.

This paper was not the will, act or deed of said Daniel B. Fayerweather. He was incompetent to and did not understand its import. While it was being executed as aforesaid said Vaughan excluded said widow from
544 the room where said testator was, and suppressed from her and from said next of kin all knowledge of what was so being done.

The decrees of said Surrogate's Court aforesaid purport to admit the said alleged will, exhibit D and the first three codicils and the last pretended codicil aforesaid, to probate; and said decrees constitute the only title or color to said estate, either as executors, legatees, trustees or otherwise, of said Ritch, Bulkley and Vaughan.

The said papers exhibits B and C were procured by fraud, duress and intimidation as aforesaid and were without consideration and there has been a substantial failure of the pretended and expressed consideration; and the same ought to be declared null and void and delivered up to be canceled.

The said decrees of said Surrogate's Court were obtained by fraud as aforesaid and the proof taken in support of the papers thereby admitted to probate was false and untrue (in all respects) as the said defendants Ritch and Vaughan then and there well knew; and certain proof which was well known to them, being proof of the
545 facts herein in that behalf alleged, was by them actively suppressed, which would have defeated said probate and without the acquiescence and papers Exhibit B and C for that purpose used by said defendants to prevent a contest and due presentation of full proof the said decree or decrees would not have been rendered.

Thereby said Surrogate's Court was moved and induced to believe and decide that said will, Exhibit D, and said pretended codicil thereto, were the last valid testamentory papers of said Daniel B. Fayerweather, and the fact and the proof thereof to the contrary, hereinbefore alleged were suppressed and not adduced in, to or before said Court or the Surrogate.

The existence of said will, Exhibit A, was unknown to complainant until on or about the 5th day of Febru-
546 ary 1894. The facts herein charged in relation thereto were not known to complainant until more recently. During all the meantime there has been other litigation between the parties hereto, which complainant was justified in believing, and did believe, precluded the institution of any suit for the relief herein prayed.

Edward M. Upham, mentioned in Exhibit A, died before the commencement of this suit, and left and has no personal representative.

Your orator therefore alleges and prays that it may be decreed herein:

That the said writing, Exhibit A, is the last will and testament of said Daniel B. Fayerweather.

That the decree and decrees of the said Surrogate's Court admitting said will, Exhibit D, and codicils thereto, to probate, were obtained by undue influence and fraud, and are null and void, with all proceedings thereupon or thereunder.

That the said Exhibit D and said four codicils, by said decree admitted to probate, are against public policy and uncertain, and were obtained by undue influence and
547 fraud, and are null and void.

That by legal effect of said will, Exhibit A, the provision as to one-half the estate is in violation of the statute, and to that extent the estate passed upon the death of Daniel B. Fayerweather to said Lucy Fayerweather and said defendants, next of kin, as provided by the statute, commonly called the statute of descent and distribution.

That the legal title to said entire estate passed by virtue of said will, Exhibit A, to the executors named therein and to their legal successors, and that they are entitled to take and to hold the same, subject to the valid trusts therein contained and subject to said rights of said Lucy Fayerweather, and of this complainant
548 as her sole executor, as aforesaid, and of said next of kin.

That the defendants Ritch, Bulkley and Vaughan account for said estate which has come into their hands and pay over such sums as appear upon such accounting to be due from them, to said executors under said will, Exhibit A, or in such manner as may be equitable or the Court may direct.

That such other defendants as have received any part of said estate, to which they are not entitled, be required to account for and pay over the same in like manner.

That such defendants as have received any part of said estate, in excess of what they are entitled to receive, may be required to account for and pay over the same in like manner.

That each party may be charged with such sums, if any, as he or she may be entitled to and shall have received.

That said Exhibits B and C be declared null and void and delivered up to be cancelled.

That this complainant and said next of kin receive their respective shares of said estate.

For an Injunction and a Receiver and

549 For general relief.

That this cause may be heard and decided with the cause aforesaid whereunto this is filed as a cross-bill as aforesaid.

To the end therefore that the said defendants may, if they can, show why your orators should not have the relief prayed herein, may it please your Honors to grant unto your orators the most gracious writ of subpœna of the United States of America to be directed to the said defendants thereby commanding them, at a certain day and under a certain pain to be specified, personally to be and appear before your Honors in this Honorable Court andthen and there to answer all and singular the premises, answer under oath being waived, and to stand

550 to, abide and perform such order and decree therein as equity may require and as your Honors shall deem meet.

JOHN B. REYNONDS,

as Executor, &c.

WM. BLAIKIE,

Solicitor for the Complainant,

and of Counsel.

STATE OF NEW YORK,
County of New York, ss.

JOHN B. REYNOLDS, being duly sworn, deposes and says that he is the complainant aforesaid; that said cross-bill of complaint is true to the best of deponent's knowledge, information and belief.

JOHN B. REYNOLDS.

551

Sworn to before me, this
18th day of February, 1899.

JOHN GOODE
Notary Public,
N. Y. Co.

[Seal.]

552

The five exhibits attached to this cross-bill will be found in the Appendix of Exhibits

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IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

PLEA OF MARIETTA COLLEGE TO CROSS-BILL OF DEFENDANT REYNOLDS AS EXECUTOR, ETC.

553

JOHN B. REYNOLDS as sole Executor, &c., of Lucy Fayerweather, deceased,
Complainant,
against
THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually and as Trustees and Executors of the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the Codicils thereto, and others,
554 Defendants.

In Equity No. 6675

The plea and answer of Marietta College, a defendant, to the cross-bill of complaint of John B. Reynolds, as Executor aforesaid, complainant.

This defendant, by protestation, not confessing or acknowledging the matters and things in and by said cross-bill set forth and alleged to be true, in such manner and

form as the same are thereby and therein set forth and alleged, doth plead in bar to the cross-bill, and for plea doth say as follows:

On or about the 26th day of June, 1893, the following named corporations, defendants herein, and hereinafter referred to as the "Five Colleges," namely, The Trustees of Amherst College, The Trustees of Dartmouth College, The Trustees of Hamilton College, the University of Rochester, and The President and Trustees of Williams College, brought in the Supreme Court of the State of New York, which court is a court of record in the said State, having general jurisdiction in law and equity
555 the action referred to in the amended bill herein, the complaint in which action is thereto annexed. In that action the complainants herein and except the said Five Colleges, all the defendants herein, except the two sought to be introduced herein by cross-bill, were defendants. By their complaint in the said action the said Five Colleges alleged, and prayed that the said Daniel B. Fayerweather died leaving a last will and testament together with four codicils thereto, copies of which were annexed to said complaint and were fully described therein. Said last will and testament was the will executed October 6th, 1884, and annexed to the cross-bill herein as Exhibit "D," and said codicils were the codicils executed respectively on December 13th, 1884, January
556 7th, 1888, March 19th, 1889, and November 15th, 1890, and referred to in the said cross-bill as having been admitted to probate on March 24th, 1891. By their said complaint the said Five Colleges further pray that by the said Supreme Court it might be adjudged and decreed, that the entire residuary estate of the said Daniel B. Fayerweather, deceased, was devised and bequeathed to the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan in trust for, and to distribute the same to and among, the said Five Colleges and certain other educational corporations which are mentioned in the ninth paragraph of the will of the said Daniel B. Fayerweather and are defendants herein; and

in and by the said complaint the said Five Colleges further alleged, and prayed that by the said Supreme Court it might be adjudged and decreed, that the said residuary estate belonged to them and to the said other educational corporations, and that they and the said corporations were entitled to receive the same and the whole of the same from these defendants and from the defendant Thomas G. Ritch.

And the said Five Colleges in and by the said complaint further prayed as follows:

"That the said defendants Ritch, Bulkley and
557 Vaughan, may be required to account for the moneys received by them under said last will and testament and codicils, and that they may be required to apply so much thereof as they may have received upon the trusts hereinbefore stated to the purposes of said trust.

That the ultimate rights of the plaintiffs as between them and each of them, and every of the other defendants, herein, be determined by the judgment in this action, in accordance with the allegations of this complaint and the prayer hereinbefore contained."

The complainant herein, by his duly authorized
558 attorney, learned in the law, duly appeared in the said action and served and filed an answer to the said complaint, a copy of which answer is annexed to the said amended bill. In and by the said answer the said complainant alleged the execution of the said will of 1884 and the said four codicils above mentioned, and also alleged the execution of the alleged codicil of November 11th, 1890, mentioned in the cross-bill of the said defendant herein, and further alleged and prayed that by the said Supreme Court it might be adjudged and decreed, that the said residuary estate was devised and bequeathed to the defendants Ritch, Bulkley and Vaughan in trust for and to distribute the same to and among the said

Five Colleges and other corporations, but that according to the laws of the State of New York, namely, Chapter 360 of the laws of 1860 of the State of New York, the said devise and bequest were void so far as the said residuary estate and the legacies given by the eighth and ninth clauses of the will attached to the said amended bill and marked "Exhibit A" exceeded one-half of the total estate of the said Daniel B. Fayerweather, and that as to such excess the defendants Ritch, Bulkley and Vaughan upon the death of the said Daniel B. Fayerweather became and were, and ever since had continued to be, trustees, seized and possessed thereof in trust,
559 to the extent of one-half part of the said excess for the benefit of Lucy Fayerweather, deceased, widow of the said Daniel B. Fayerweather, and to the extent of the remaining half-part of the said excess for the benefit of the defendants Emma S. Fayerweather and Mary W. Achter. In and by his said answer, the said defendant Reynolds alleged that the probate of the said will and four codicils first above mentioned, by the said Surrogate's Court, was obtained by means of, and as a part of, the settlement, agreement and releases entered into between the said Lucy Fayerweather and the defendants Ritch, Bulkley and Vaughan, and set out in the said cross-bill herein (and also referred to in the original bill herein and the complaint attached thereto). In and
560 by his said answer the said complainant set forth in full the releases, agreement and settlement referred to in the said amended bill and in the complaint attached thereto and made in respect to the said releases, agreements and settlement the same allegations as are made in the said cross-bill, to wit, that the same were, and that each of them was, obtained by the defendants Ritch, Bulkley and Vaughan by means of fraud, coercion and deception practiced upon the said complainant by them and in and by the said answer the complainant herein further alleged, and prayed that by the said Supreme Court it might be adjudged and decreed, that the said releases, agreements and settlement were, and that each

of them was fraudently and void, and that they and each of them should be vacated and set aside. In and by their said answer the said complainants denied that the said excess belonged to the said Five Colleges and other corporations and denied that the said Five Colleges and other corporations were, or that any of them was, entitled to receive the same or any portion of the same.

And in and by the said answer the said complainant further prayed in said action as follows:

"That the said defendants, Ritch, Bulkley and Vaughan, may be required to account for the
561 moneys and property received by them from the estate of said Daniel B. Fayerweather under said last will and testament and codicils, or otherwise and for the application thereof, and to pay over the said moneys and property remaining in their hands among the parties of this action, according to their several and respective rights thereto as the same may be adjudged in this action.

That the ultimate rights of the parties to this action in the estate of the said Daniel B. Fayerweather be determined and enforced by the judgment of this action, in accordance with the allegations of this answer and the foregoing prayers for relief herein."

562

The issues raised by the said answer, including the issue as to the validity of the said releases, agreements and settlement, and each of them, and including as a part of said settlement the issue as to the validity of the consent given by the said Lucy Fayerweather to the probate of said will of 1884 and the said four codicils first above mentioned, were the same issues which are tendered to the defendants herein by the allegations of the complainant't amended bill. The said issues raised as aforesaid by the said answer and the whole issues in said action were thereafter and on or about the 24th day of January, 1894, regularly brought on for trial, and were tried at a

term of the said Supreme Court duly held in and for the County of New York, at which presided Hon. CHARLES H. TRUAX, one of the Justices of the said Court. Upon such trial the said complainant produced and gave testimony in support of his said allegation, attacking the validity of the said agreements, releases and settlement, and the same was duly heard and considered by the said Court, and the questions of fact and the questions of law thereby presented were duly argued before the said Court for the said complainant by his counsel learned in the law and were likewise considered by the said Court,

563 and upon the issues so presented, the Court thereupon decided in favour of the said Five Colleges and against the complainant herein; and decided that the said Five Colleges and other corporations were entitled to said residuary estate and to the whole thereof, and that said complainant had no interest whatever in the said residuary estate. In and by the said decision, and as a necessary part thereof, the said Court decided that the will executed on October 6th, 1884, above mentioned, and the four codicils executed on or about December 13th, 1884, January 7th, 1888, March 19th, 1889, and November 15th, 1890, respectively, were the duly executed last will and testament and duly executed codicils thereto of the said Daniel B. Fayerweather, and that the

564 same had been duly admitted to probate by the decrees of the Surrogate of the County of New York of February 24th, 1891, referred to in the cross-bill herein, and also that the consent of Lucy Fayerweather to said decrees of probate was valid.

At the time of the said trial and decision and of the judgment entered thereon, as hereinafter alleged, the law of the State of New York was, and the statutes of the said State provided, as follows:

> "The decision of the Court, or the report of a referee upon the trial of the whole issues of fact, may state separately the facts found and the conclusions of law, and direct the judgment to be

entered thereon; or the court or referee, in deciding the issues, may file a decision stating concisely the grounds upon which such issues have been decided, and direct the judgment to be entered thereon, which decision so filed shall form part of the judgment roll. In an action where the costs are in the discretion of the Court, the decision or report must award or deny costs, and if it awards costs it must designate the party to whom costs to be taxed are awarded. Whenever judgment is entered on a decision which does not state separately the facts found, the defeated party may file an exception to
565 such decision, in which case, on an appeal from the judgment entered thereon upon a case containing exceptions, the General Term of the Court in which the action is pending shall review all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial or grant to either party such judgment as such party may be entitled to."

At the request of all the parties to the said action, including the said complainant, the said Court filed, instead of findings of fact and conclusions of law separately stated, the general decision, which is referred to in the said amended bill and made a part thereof. In
566 accordance with the direction contained in the said decision, the judgment, which is referred to in the said amended bill and a copy of which is annexed thereto, was, on or about the 28th day of December, 1894, duly entered and filed in the office of the Clerk of the County of New York, and therein and thereby it was adjudged that the said residuary estate was held in trust by the said defendants Ritch, Bulkley and Vaughan for the said Five Colleges and other corporations, as alleged in the said complaint, and therein and thereby it was further adjudged that the defendants Ritch, Bulkley and Vaughan should distribute, and they were therein and thereby directed to distribute the said residuary estate

as follows, that is to say, to the defendant the Northwestern University the sum of one hundred thousand dollars ($100,000), with its just and equitable proportion of the income, earnings and interest accrued upon the said residuary estate, and the entire remainder of the said residuary estate in equal parts to the said Five Colleges and other corporations, except the said Northwestern University.

Under the provisions of law aforesaid, the said complainant, on or about the 8th day of January, 1895, filed in the office of the Clerk of the City and County of New York an exception to the said decision, and on or
567 about the 30th day of December, 1894, he duly appealed from the said judgment to the General Term of said Court. A copy of the complainant's notice of such an exception and a copy of his notice of appeal from the said judgment are hereto annexed. The said appeal was upon a case containing exceptions and containing also all the evidence taken upon the trial of the said action. On or about the 14th day of May, 1895, the said appeal duly came on for argument before the said General Term, and for hearing by it, and upon such case and exception the said appeal was duly argued before, and duly heard and considered by, the said General Term. Upon such argument and hearing, the said complainant appeared by his said attorney and counsel
568 learned in the law, who by oral argument and by briefs contended before the said Court in support of the allegations contained in the said answer, and against the validity of the said releases, agreements, consents and settlement. Upon such argument and hearing of the said appeal, the said General Term had jurisdiction, and it was its duty, and the said complainant then claimed and asserted that it had the jurisdiction, and that it was its duty, to review and to decide all the questions of law and all the questions of fact involved in the said action, and to decide upon the evidence then before the Court that the said releases, agreement and settlement were invalid. The said General Term, in the exercise of the

power and jurisdiction conferred upon it by the said laws and in the discharge of its said duty, and at the solicitation and request of the said complainant, did review and did decide all the questions of law and all the questions of fact presented by the said evidence, record and argument, including the question as to the validity of the said releases, agreements and settlement, and the said General Term thereupon decided that the said residuary estate belonged to, and should be distributed among, the said Five Colleges and other corporations as provided in the said judgment. At the time of such decision the law of the State of New York was, and
569 the statutes of the said State provided, as follows:

> "A judgment, affirming wholly or partly a judgment, from which an appeal has been taken, shall not, expressly and in terms, award to the respondent, a sum of money, or other relief, which was awarded to him by the judgment so affirmed."

And the said General Term thereupon affirmed the said judgment and an order of affirmance and a judgment of affirmance were thereupon duly made and entered. A copy of the opinions of the said General Term, rendered upon its said decision, is hereto annexed and is made a part hereof. A copy of the said order of affirmance
570 and a copy of the said judgment of affirmance are also hereto annexed and made a part hereof.

Thereafter the said complainant appealed to the Court of Appeals of the State of New York from the said judgment of affirmance. The said Court of Appeals had jurisdiction to correct, and was and is the only court other than the Supreme Court of the United States having jurisdiction to correct, any error in the judgment of the said General Term. The complainant herein, by his said attorneys and counsel, appeared in the said Court of Appeals, and by briefs and oral argument contended before that Court, in support of the allegations contained

in his said answer, and against the judgment of affirmance, and against the validity of the said releases, agreements and settlement, and by briefs and oral argument in that court, the said complainant by his said attorneys and counsel contended that the said judgment of the said General Term should be modified by setting aside the said releases, agreement and settlement as inequitable and fraudulent and by awarding the said residuary estate and the amount of the said legacies given by the said eighth and ninth clauses, so far as they together exceed one-half of the estate of the said Daniel B. Fayer-

weather, to the estate of the said Lucy Fayerweather
571 and to the said Emma S. Fayerweather and Mary W.

Achter. Thereupon the said Court of Appeals decided that no error had been committed in the decision of the lower court, and affirmed in all respects the said judgment of the said General Term. A copy of the opinions rendered upon said decision is hereto annexed, as part hereof.

Upon its said decision and the *remittitur* returned by said Court of Appeals to the said Supreme Court, judgment, in accordance with the said decision, was duly entered in the office of the said clerk. A copy of the order directing such judgment is also hereto annexed and made a part hereof. Thereupon and on or about the first

day of March, 1897, the said complainant made a
572 motion in the said Court of Appeals to amend the

remittitur of that Court so that it should direct the Justice who presided at the trial of the said action to "consider" the evidence concerning the said releases, agreements and settlements, the law bearing upon the said evidence, agreements and releases, the questions of law and fact propounded for and against the validity of said agreements and releases, and to determine whether the same were valid and binding or invalid and void. Said motion was made upon an order to show cause, dated the 28th day of January, 1897, the affidavit of William Blaikie, verified the 28th day of January, 1897, a notice of motion dated February 17, 1897, and the affi-

davit of William Blaikie verified the 17th day of February, 1897. Copies of said papers are hereto annexed and made part hereof. The said motion was duly heard and considered by the said Court, and after such hearing and consideration the same was by it denied. Thereafter the reference directed by the said judgment entered as aforesaid on or about the 28th day of December, 1894, was duly brought on for hearing before the Referee therein named and upon such hearing the said complainant appeared by his said attorneys and counsel, learned in the law, and participated therein, and the said Referee thereupon made and filed his report, a copy of which
573 is hereto annexed and made a part hereof. Exceptions to the said report, a copy of which exceptions is hereto annexed and made a part hereof, were thereupon filed by the said complainant in the office of the said Clerk; and the same were thereupon duly brought on for hearing, and a motion was duly made to confirm the said report, at a term of the said Supreme Court duly held in and for the said County of New York on or about the sixth day of July, 1897. Upon such motion and hearing the said complainant, by his attorneys and counsel, duly appeared and opposed the confirmation of the said report. The said Court thereupon, after due hearing and consideration, overruled the said exceptions, and a final judgment, a copy of which is hereto annexed and
574 made a part hereof, was thereupon made and entered in the office of the said Clerk on or about the 6th day of July, 1897, wherein and whereby the said report was confirmed by the said Supreme Court, and wherein and whereby it was by the said Court adjudged that the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan should distribute, and they were thereby directed to distribute the said residuary estate in accordance with the terms of the said first mentioned judgment; and thereupon the said defendants, pursuant to the directions contained in the said judgment, proceeded to pay and distribute, and from time to time thereafter they did pay and distribute a large part of the estate of

the said Daniel B. Fayerweather to and among the corporations entitled thereto under the said judgment, and such payment and distribution were by them continued down to a time prior to the date when was made by the complainants herein a motion for an order restraining and enjoining the said defendants from such payment and distribution. Such motion having been granted and such an order having been made, no such further payment or distribution was made by the said defendant until the said order, upon an appeal therefrom had been reversed by the United States Circuit Court of Appeals and an order of reversal duly entered; whereupon such pay-
575 ment and distribution were by the said defendants resumed and have been from time to time continued down to the present time as compelled by the said judgment.

All of which matters and things this defendant doth aver and plead in bar to the said cross bill, and humbly prays judgment of this Honorable Court whether it should make any or further answer to the said amended bill, hereby pleaded unto as aforesaid.

And this defendant, not waiving the above plea, but wholly relying and insisting thereon, and in aid and support thereof, for answer to the said cross-bill, or to so much and such part thereof as it is deemed
576 that it is in anywise material or necessary to make answer unto, answering:

Denies that the judgment in the said action is fraudulent or that any of the defendants have committed any fraud in respect thereof.

Denies all and all manner of wrongful combination and confederacy wherewith it is by the said bill charged, without this, that any other matter, cause or thing in the said complainants' amended bill contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered,

confessed, traversed and avoided or denied, is true to the knowledge or belief of the said defendant.

All of which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

MARIETTA COLLEGE,
[CORPORATION SEAL.] BY
W. W. MILLS, Trustee.

577

RITCH, WOODFORD, BOVEE and WALLACE,
Solicitors for said Defendant.

SOUTHERN DISTRICT OF OHIO,
State of Ohio,
County of Washington. } ss.:

I, W. W. Mills, being sworn, depose and say: I am one of the trustees of the corporation Marietta College, a defendant herein. I have read the foregoing plea and answer in support thereof, and am familiar with their contents; the said plea and answer are true in point of
578 fact to my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe the said plea and answer to be true; neither the said plea nor the said answer is interposed for delay.

W. W. MILLS.

Sworn to before me this 21st day of August, 1899.

R. L. NYE,
[SEAL.] Notary Public,
Washington County, Ohio.

STATE OF OHIO,
County of Washington, } ss.:
Southern District of Ohio.

I, Orlando Trotter, Clerk of the Common Pleas Court, in the said County, the same being a Court of record, having by law a seal, do hereby certify that R. L. Nye, who submitted the annexed certificate was, at the time of taking the same, a Notary Public residing in the said county, and duly authorized by the laws of Ohio to take the acknowledgment and proof of deeds to be recorded therein, and that the same is taken and certified
579 in all respects as required by the laws of the said State; that I am well acquainted with the handwriting of said R. L. Nye, and verily believe the signature attached to the said certificate to be his genuine signature.

Witness my hand and official seal this 21st day of August, 1899.

ORLANDO TROTTER,

[SEAL.] Clerk.

I hereby certify that the foregoing plea and answer are in my opinion well founded in point of law.

C. N. BOVEE, JR.

580

New York, August 17, 1899.

Index of papers annexed to foregoing plea of Marietta College.

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The following Defendants have adopted Marietta's Plea to the Cross Bill of Defendant Reynolds as Executor:

The Defendants

582 Thomas G. Ritch individually and as Executor and Trustee of will of Daniel B. Fayerweather, deceased.

Cornell University.

The President and Trustees of Bowdoin College.

The President and Trustees of Yale College at New Haven, Conn.

Manhattan Eye and Ear Hospital.

Presbyterian Hospital.

Wesleyan University.

St. Luke's Hospital and

Adelbert College.

have filed pleas to said cross-bill substantially like the the foregoing plea of Marietta College; the difference

being in the name of each defendant in the first line of the plea, in the signatures and verifications and the certificates as to notaries being in each instance those that would naturally go with such respectively.

Replications like that to the pleas of Amherst and Williams Colleges have been duly filed to said pleas to said cross-bill.

By order of Lacambe, J., May 26th, 1902, a plea like said plea of Marietta College to the said cross-bill was also adopted by the following defendants, namely:

The Trustees of Columbia University.

Mt. Sinai Hospital.

583 The Woman's Hospital in the State of New York.

The Trustees of Dartmouth College,

and by the same order Replications were deemed to be duly filed by said cross-complainant to said four pleas last named.

See said order in Exhibit 133, page 657, in Appendix of Exhibits.

584

IN THE UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

PLEA AND ANSWER OF HAMILTON COLLEGE TO THE REYNOLDS CROSS BILL.

JOHN B. REYNOLDS, as Sole Executor of the Last Will, etc., of Lucy Fayerweather, de-
585 ceased,
COMPLAINANT
against
THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually, and as Executors of the LastWill and Testament of Daniel B. Fayerweather, deceased, and of the Codicils thereto, and others,
DEFENDANTS

Cross Bill
In Equity No. 6675

586

The plea and answer of the Trustees of Hamilton College, defendant, to the cross-bill of complaint of John B. Reynolds, as sole executor of the last will and testament and the codicil thereto, of Lucy Fayerweather, deceased.

This defendant, by protestation, not confessing or denying the matters and things in and by said bill set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged, doth plead in bar to the bill herein, and for plea does say as follows:

On or about June 26th, 1893, the following named corporations, defendants herein, and hereinafter referred to

as the "Five Colleges," namely the Trustees of Amherst College, the Trustees of Dartmouth College, the Trustees of Hamilton College, the University of Rochester, and the President and Trustees of Williams College, brought in the Supreme Court of the State of New York, which court is a court of record in said state, having general jurisdiction in law and equity, a certain action which is referred to in the original bill in this suit, and the complaint wherein is annexed hereto as Exhibit A and made a part hereof.

In that action, the said John B. Reynolds, the complainant in the cross-bill herein, together with one
587 Morris B. Beardsley, as executors under the last will and codicil thereto of Lucy Fayerweather, deceased, and (except the five colleges, and also Joshua M. Fiero and the Randolph and Macon College at Boydton), all the defendants named in the cross-bill herein, were parties defendant.

By their complaint in said action the said five colleges allege that the said Daniel B. Fayerweather died leaving a last will and testament together with four codicils thereto, copies of which were annexed to said complaint and were fully described therein. Said last will and testament was the will executed October 6th, 1884, and annexed to the cross-bill herein as Exhibit D, and said codicils executed, respectively, on December 13th,
588 1884, January 8th, 1888; March 19th, 1889, and November 15th, 1890, and referred to in the said cross-bill as having been admitted to probate on March 24th, 1891. By their said complaint the said five colleges further alleged and prayed that by said Supreme Court it might be adjudged and decreed that under the said will above mentioned and the said codicils the entire residuary estate of the said Daniel B. Fayerweather was devised and bequeathed to the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, and that it was held by the said defendants in trust for, and to distribute the same to and among, the said five colleges and certain other educational corporations which are

mentioned in the ninth paragraph of said will, and which are defendants herein; and by the said complaint said five colleges further alleged and prayed that by the said court it might be adjudged and decreed that the said residuary estate belonged to them and to the said other educational corporations, and that they and the said corporations were entitled to receive the same and the whole of the same from the said defendants Ritch, Bulkley and Vaughan. The property to which the complainant Reynolds now claims in his cross-bill that the next of kin and the state of the widow of said Fayerweather are entitled, constitutes a portion of the property com-
589 prised in the said residuary estate.

And the said five colleges, in and by said complaint, further prayed as follows:

"That the said defendants Ritch, Bulkley and Vaughan may be required to account for the moneys received by them under said last will and testament and codicils (meaning the will and four codicils above mentioned), and that they may be required to apply so much thereof as they may have received upon the trusts hereinbefore stated to the purposes of said trust.

"That the ultimate rights of the plaintiffs, as between themselves and each of them and every of the other defendants herein, be determined by the judgment in this action, in accordance with the allegations of this
590 complaint and the prayer hereinbefore contained."

The said complainant, John B. Reynolds, together with said Morris B. Beardsley, who then was, but no longer is, a co-executor with said John B. Reynolds of the last will and codicil of Lucy Fayerweather, deceased, as such executors of said last will and codicil, representing the estate of said Lucy Fayerweather, by their duly authorized attorney learned in the law, duly appeared in the said action and served and filed an answer to the said complaint. A copy of said answer is annexed hereto as Exhibit "B" and made a part hereof. In and by said answer the said Reynolds and Beardsley alleged that Daniel B. Fayerweather duly executed the said will of

1884, and the said four codicils above mentioned, and also alleged the execution by him of the alleged codicil of November 11th, 1890, mentioned in the cross-bill of the said defendant Reynolds herein, and further alleged and prayed that, by the said Supreme Court, it might be adjudged and decreed that under the said will and codicils the said residuary estate was devised and bequeathed to the defendants Ritch, Bulkley and Vaughan, in order that it might be by them held in trust for, and to distribute the same to and among, the said five colleges and other corporations, but that according to the laws of the State of New York—namely, Chapter 360 of the Laws
591 of 1860 of the State of New York—the said devise and bequest were void, so far as the said residuary estate and the legacies given by the eighth and ninth clauses of the said will exceeded one-half of the total estate of the said Daniel B. Fayerweather, and that as to such excess the defendants Ritch, Bulkley and Vaughan, upon the death of the said Daniel B. Fayerweather, became and were and ever since had continued to be trustees, seised and possessed thereof in trust to the extent of one-half part of the said excess for the benefit of said Lucy Fayerweather, deceased, widow of said Daniel B. Fayerweather, and to the extent of the remaining half part of the said excess for the benefit of the complainants herein, Emma S. Fayerweather and Mary W. Achter. In and by
592 their said answer the said Reynolds and Beardsley further alleged that the probate of the said will and four codicils first above mentioned, by the said Surrogate's Court, was obtained by means of, and as a part of, the settlement, agreement and releases entered into between the said Lucy Fayerweather and the defendants Ritch, Bulkley and Vaughan, and set out in said cross-bill herein (and also referred to in the original bill herein and in Exhibit A attached hereto), and said Reynolds and Beardsley, in their said answer, set forth in full the said releases, agreements and settlement, and made in respect thereto the same allegations as are made in the cross-bill herein—to wit, that the same were, and each of

them was, obtained by the defendants Ritch, Bulkley and Vaughan by means of fraud, coercion and deception practiced upon said Lucy Fayerweather by them, and in and by said answer the said Reynolds and Beardsley further alleged and prayed that by the Supreme Court it might be adjudged and decreed that the said releases, agreements and settlements were, and that each of them was, fraudulent and void, and that they, and each of them, should be vacated and set aside. In and by the said answer said Reynolds and Beardsley denied that the said excess above mentioned belonged to the said five colleges and other corporations, and denied that the said five
593 colleges and other corporations were, or that any of them was, entitled to receive the same, or any portion of the same.

And in and by their said answer the said Reynolds and Beardsley further prayed in said action as follows:

"That the said defendants Ritch, Bulkley and Vaughan may be required to account for the moneys and property received by them from the estate of said Daniel B. Fayerweather under said last will and testament and codicils, or otherwise, and for the application thereof, and to pay over the said moneys and property remaining in their hands among the parties to this action, according to their several respective rights thereto as the same may be adjudged in this action.

594 "That the ultimate rights of the parties to this action in the estate of the said Daniel B. Fayerweather be determined and enforced by the judgment in this action, in accordance with the allegations of this answer and the foregoing prayers for relief herein."

The issues raised by the said answer, including the issue as to the validity of the said releases, agreements and settlement, and including as a part of said settlement the issue as to the validity of the consent given by the said Lucy Fayerweather to the probate of said will of 1884, and the said four codicils first above mentioned, were the same issues which are tendered herein by the allegations of the said cross-bill of the defendant Reynolds. The

said issues raised as aforesaid by the said answer, and the whole issues in said action, were thereafter and on or about January 24th, 1894, regularly brought on for trial and were tried at a Term of the said Supreme Court held in and for the County of New York, at which presided the Honorable Charles H. Truax, one of the Justices of the said Court. Upon the said trial the said Reynolds and Beardsley produced and gave testimony in support of their said allegations attacking the validity of the said agreements, releases, settlement and consent, and the same was duly heard and considered by the said Court,

and the questions of fact and the questions of law
595 thereby presented were duly argued before the said

Court for the said Reynolds and Beardsley by their counsel, learned in the law, and were likewise considered by the said Court, and upon the issues so presented the Court thereupon decided in favor of the said five colleges and against the said Reynolds and Beardsley, and decided that the said five colleges and other corporations were entitled to the said residuary estate and to the whole thereof, and that the estate of Lucy Fayerweather had no interest therein whatever. The said Court had the power and jurisdiction to decide, and in and by the said decision, and as a necessary part thereof, the said Court did decide, that the will executed on October 6th, 1884,

above mentioned, and the four codicils executed on
596 or about December 13th, 1884; January 7th, 1888;

March 19th, 1889, and November 15th, 1890, respectively, were the only duly executed last will and testament and the only duly executed codicils thereto of the said Daniel B. Fayerweather, and that the same had been duly admitted to probate by the decree of the Surrogate of the County of New York, referred to in the said cross-bill. The said Court also then and there decided that the settlement above mentioned, including the consent given to the probate of the said will and codicils as a part thereof, had not been obtained by fraud, coercion or without adequate consideration, and that it should not be set aside or vacated.

At the time of the said trial and decision and of the judgment thereon it was the law of the State of New York, and the statutes of the said State provided, as follows:

"The decision of the court, or the report of a referee upon the trial of the whole issues of fact, may state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon; or the court or referee, in directing the issues, may file a decision stating concisely the grounds upon which such issues have been decided and direct the judgment to be
597 entered thereon, which decision so filed shall form part of the judgment roll. In an action where the costs are in the discretion of the court the decision or report must award or deny costs, and if it awards costs it must designate the party to whom costs to be taxed are awarded. Whenever judgment is entered on a decision which does not state separately the facts found the defeated party may file an exception to such decision, in which case, on an appeal from the judgment entered thereon upon a case containing exceptions, the General Term of the court in which the action is pending shall review all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such
598 judgment as such party may be entitled to."

At the request of all the parties to the said action, including the said Reynolds and Beardsley, the said court filed, instead of findings of fact and conclusions of law separately stated, a general decision, which is annexed hereto as Exhibit C, and made a part hereof. In accordance with the directions contained in said decision, a judgment, which is annexed hereto as Exhibit D, and made a part hereof, was on or about December 28th, 1894, duly entered and filed in the office of the County Clerk of the County of New York, and therein and thereby it was adjudged that the said residuary estate was held in

said trust by the said defendants Ritch, Bulkley and Vaughan for the said five colleges and other corporations as alleged in said complaint; and therein and thereby it was further adjudged that the defendants Ritch, Bulkley and Vaughan should distribute, and they were therein and thereby directed to distribute, the said residuary estate as follows, that is to say: To the defendant the Northwestern University one hundred thousand dollars ($100,000) with its just and equitable proportion of the income, earnings and interest accrued upon the said residuary estate, and the entire remainder of the said residuary estate in equal parts to the said five
599 colleges and other corporations, except the said Northwestern University.

Under the provision of law aforesaid the said Reynolds and Beardsley, as executors of the estate of Lucy Fayerweather, on or about January 8th, 1895, filed in the office of the Clerk of the City and County of New York an exception to the said decision, and on or about December 30th, 1894, they duly appealed from the said judgment to the General Term of the said court. The said appeal was upon a case containing exceptions and containing also all the evidence taken upon the trial of the said action. The said appeal on or about May 14th, 1895, duly came on for argument before the said General Term and for hearing by it, and upon said case and
600 exceptions the said appeal was duly argued before and duly heard and considered by the said General Term. Upon such argument and hearing the said Reynolds and Beardsley appeared by their said attorney and counsel learned in the law, who, by oral argument and by brief, contended before the said court in support of the allegations contained in the said answer, and against the validity of the said releases, agreements and settlement. Upon such argument and hearing of the said appeal, the said General Term had jurisdiction and it was its duty, and the said Reynolds and Beardsley then claimed and asserted that it had the jurisdiction and that it was its duty, to review and to decide all the questions

of law and all the questions of fact involved in the said action, and to decide upon the evidence then before the court that the said releases, agreements and settlement were invalid. The said General Term, in the exercise of the power and jurisdiction conferred upon it by the said laws and in the discharge of its said duty, and at the solicitation and request of the said Reynolds and Beardsley, did review and did decide all the questions of law and all the questions of fact presented by the said evidence, record and argument, including the question as to the validity of the said releases, agreement and settlement, and the

said General Term thereupon decided that the said
601 residuary estate belonged to and should be dis-

tributed among the said five colleges and other corporations as provided by the said Special Term judgment. At the time of such decision it was the law of the State of New York, and the statutes of said State provided, as follows:

"A judgment, affirming wholly or partly a judgment from which an appeal has been taken, shall not, expressly and in terms, award to the respondent a sum of money, or other relief, which was awarded to him by the judgment so affirmed."

And the said General Term thereupon affirmed the
602 said judgment, and an order of affirmance and a

judgment of affirmance was thereupon duly made and entered. A copy of the opinions of the said General Term, rendered upon its said decision, is hereto annexed as Exhibit E and is made a part hereof. Thereafter the said Reynolds and Beardsley, as executors of the estate of Lucy Fayerweather, appealed to the Court of Appeals of the State of New York from the said judgment of affirmance. The said Court of Appeals had jurisdiction to correct, and was and is the only court, other than the Supreme Court of the United States, having jurisdiction to correct any error in the judgment of the said General Term. The said Reynolds and Beardsley, by their said

attorney and counsel, appeared in the said Court of Appeals, and by briefs and oral argument contended before that court in support of the allegations contained in their said answer against the judgment of affirmance, and against the validity of the said releases, agreements and settlement, and by briefs and oral argument in that court the said Reynolds and Beardsley, by their said atterney and counsel, contended that the said judgment of the said General Term should be modified by setting aside the said releases, agreements and settlement as inequitable and fraudulent and by awarding the said residuary estate to the estate of said Lucy Fayer-
603 weather and to Emma S. Fayerweather and Mary W. Achter, defendants herein. Thereupon the said Court of Appeals decided that no error had been committed in the decision of the lower court, affirmed in all respects the said judgment of the said General Term, and upon its decision and the remittitur returned by it to the said Supreme Court, judgment, in accordance with said decision, was duly entered in the office of the said clerk. Thereupon and on or about the first day of March, 1897, the said Reynolds and Beardsley made a motion in the said Court of Appeals to amend the remittitur of that court so that it should direct the Justice who presided at the trial of the said action to consider the evidence concerning the said releases, agreements and settlement,
604 the law bearing upon the said evidence, agreements, releases and settlement, the questions of law and fact propounded for and against the validity of said agreements, releases and settlement, and to determine whether the same were valid and binding or invalid and void. Said motion was made upon an order to show cause, dated 28th day of January, 1897; the affidavit of William Blaikie, verified the 28th day of January, 1897; a notice of motion dated February 17th, 1897, and the affidavit of William Blaikie, verified the 17th day of February, 1897. Said affidavits alleged in substance and effect the same matters and things alleged in the original bill herein, and set out at length the alleged facts by

reason of which the said Reynolds then claimed, as he now seeks to claim in his cross-bill herein, that the said agreements, releases and settlement had been procured by fraud, duress and intimidation and were without consideration. The said motion was duly heard and considered by the said court, and after such hearing and consideration was by it denied. Thereafter the reference directed by said judgment was duly brought on for hearing before the referee therein named, and upon such hearing the said Reynolds and Beardsley appeared by their said attorney and participated therein, and the said referee thereupon made and filed his report. Except-
605 tions to said report were thereupon filed by the said Reynolds and Beardsley in the office of the said clerk; and the same were thereupon duly brought on for hearing and a motion was duly made to confirm the said report at a term of the said Supreme Court duly held in and for the County of New York on or about the 6th day of July, 1897. Upon such motion and hearing the said Reynolds and Beardsley, by their said attorney, duly appeared and opposed the confirmation of the said report. The court thereupon, after due hearing and consideration, overruled the said exceptions, and a final judgment, a copy of which is hereto annexed as Exhibit F was made a part hereof, was thereupon made and entered in the office of the said clerk on or about the 6th day of
606 July, 1897, wherein and whereby the said report was confirmed by the said Supreme Court, and wherein and whereby it was by said court adjudged that the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan should distribute, and they were thereby directed to distribute, the said residuary estate in accordance with the terms of the first-mentioned judgment; all of which matters and things this defendant does aver and plead in bar to the said bill, and humbly pray the judgment of this Honorable Court whether it should make any other or further answer to the said cross-bill hereby pleaded unto as aforesaid.

And this defendant, not waiving the above plea, but

wholly relying and insisting thereon, and in aid and support thereof, for answer to the said cross-bill, or to so much and such part thereof as it is deemed that it is in any wise material or necessary to make answer unto, answering, saith:

It denies that the judgment in the said action in the Supreme Court of the State of New York is fraudulent, or that any of the defendants have committed any fraud or combination in respect thereof.

It denies all and all manner of fraud and wrongful
607 combination and confederacy wherewith it is by the said bill charged; without this: that any other matter, cause or thing in the said complainant's cross-bill contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and specifically answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant.

All of which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

608

ROOT, HOWARD, WINTHROP & STIMSON,
Solicitors for the Defendant the Trustees of Hamilton College,
32 Liberty Street,
New York City.

SOUTHERN DISTICT OF NEW YORK, }
City and County of New York, } ss.:

Elihu Root, being duly sworn, deposes and says:

I am one of the trustees of the corporation, The Trustees of Hamilton College, one of the defendants in this suit; I have read the foregoing plea and answer of the said defendant and am familiar with the plea and answer thereof; said plea and answer are true in point of fact to my knowledge, except as to the matter therein stated to be alleged on information and belief and as to those matters I believe said plea and answer to be
609 true. Neither the said plea nor the said answer is interposed for delay.

ELIHU ROOT.

Sworn to before me this 31st }
day of August, 1899. }

FRANCIS R. FORAKER,
[SEAL.] Notary Public,
New York County.

I hereby certify that the foregoing plea and answer are in my opinion well founded in point of law.

New York, August 31st, 1899.

610 HENRY L. STIMSON.

The following exhibits attached to said plea of Hamilton to the cross-bill appear in Appendix of Exhibits and in Book of Pleadings as follows:

Book of Pleadings	PAGE
Complaint in Five College action.....	26
Answer of Executor of Widow in do.....	42
Decision at Trial Term by Truax, J.....	63
Judgment at Trial-Term by Truax, J.,...	66
Opinions of General Term	52—59
Final Judgment	167—182

By order of Lacombe, J., of May 26th, 1902, the following defendants are deemed to have filed a plea to the cross-bill of J. B. Reynolds as executor, etc., like the foregoing pleas of the Trustees of Hamilton College to said cross-bill, namely:

Northwestern University.

Union Theological Seminary.

And said cross-complainant to have duly filed his replication thereto.

By order of Lacombe, J., of March 6th, 1901, defendant Lafayette College is deemed to have filed a plea
611 to said cross-bill like that filed by the Trustees of Hamilton College, and said cross-complainant to have duly filed a replication thereto.

A similar order, of the same date, as to Lafayette's plea to amended bill appears upon pages 240—242 of the Appendix of Exhibits.

Defendants the Trustees of Amherst College and the President and Trustees of Williams College filed pleas and answers to said cross-bill like that of Hamilton College aforesaid.

612

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

PLEA AND ANSWER OF EXECUTORS BULKLEY AND VAUGHAN TO THE REYNOLDS CROSS-BILL.

JOHN B. REYNOLDS, as Sole Executor of the Last Will and Testament and Codicil of Lucy Fayerweather, de-
613 ceased,

COMPLAINANT

against

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually and as Trustees and Executors of the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the Codicils thereto, and others,

DEFENDANTS

In Equity No. 6675

614

The joint and several plea of Justus L. Bulkley and Henry B. Vaughan, individually and as Trustees and Executors of the last will and testament of Daniel B. Fayerweather, deceased, and of the codicils thereto, defendants, to the cross-bill of John B. Reynolds, as the sole Executor of the last will and testament and codicil of Lucy Fayerweather, deceased.

These defendants, by protestation, not confessing or acknowledging the matters and things in and by said cross-bill set forth and alleged to be true, in such man-

ner and form as the same are thereby and therein set forth and alleged, do plead in bar to the said cross-bill and for plea do say as follows:

On or about the twenty-sixth day of June, 1893, the following named corporations, defendants herein, and hereinafter referred to as the "Five Colleges," namely, the Trustees of Amherst College, the Trustees of Dartmouth College, the Trustees of Hamilton College, the University of Rochester and the President and Trustees of Williams College, brought in the Supreme Court of the State of New York, which court is a court of
record in the said State, having general jurisdiction
615 in law and equity, the action referred to in the bill
herein as amended, the complaint in which action is thereto annexed. In that action the complainant herein and, except the five colleges, the defendant Joshua M. Fiero and the defendant the Randolph and Macon College, at Boydton, Mecklenburg, Virginia, all the defendants herein, were defendants. By their complaint in the said action the said five colleges alleged, and prayed that by the said Supreme Court it might be adjudged and decreed, that the entire residuary estate of the said Daniel B. Fayerweatheather, deceased, was by him devised and bequeathed to the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan in trust for, and to
distribute the same to and among the said five col-
616 leges, and certain other educational corporations
which are defendants herein, and are mentioned in the ninth paragraph of the last will and testament of the said Daniel B. Fayerweather, referred to in the said cross-bill and admitted to probate, with four codicils thereto; also referred to in the said cross-bill, by the Surrogate's Court of the County of New York, on the 24th day of February and the 24th day of March, 1891. And in and by the said complaint the five colleges further alleged, and prayed that by the said court it might be adjudged and decreed, that the said residuary estate belonged to them and to the said other educational corporations, and that they and the said educational corporations were en-

titled to receive the same and the whole of the same from these defendants and from the defendant Thomas G. Ritch.

And the said five colleges in and by the said complaint further prayed as follows:

"That the said defendants, Ritch, Bulkley and Vaughan, may be required to account for the moneys received by them under the said last will and testament and codicils, and that they may be required to apply so much thereof as they may have received upon the trusts hereinbefore stated to the purposes of said trust.

"That the ultimate rights of the plaintiffs, as be-
617 tween them and each of them, and every of the other defendants herein, be determined by the judgment in this action, in accordance with the allegations of this complaint and the prayer hereinbefore contained."

The complainant herein, by his duly authorized attorney, learned in the law, duly appeared in the said action and served and filed an answer to the said complaint, a copy of which answer is annexed to the said bill. In and by the said answer the said complainant alleged the making by the said Daniel B. Fayerweather of the said last will and testament and codicils, admitted to probate, as aforesaid, and by the said answer the said complainant
further alleged and prayed that by the said Supreme
618 Court it might be adjudged and decreed, that the said residuary estate was by the said last will and testament devised and bequeathed to the defendants Ritch, Bulkley and Vaughan in trust for, and to distribute the same to and among the said five colleges and other corporations, but that according to the laws of the State of New York, namely, Chapter 360 of the laws of 1860 of the State of New York, the said devise and bequest were void so far as the said residuary estate and the legacies given by the eighth and ninth clauses of the said last will and testament exceeded one-half of the total estate of the said Daniel B. Fayerweather, and that as to such excess the defendants Ritch, Bulkley and

Vaughan upon the death of the said Daniel B. Fayerweather became and were, and ever since had continued to be, trustees, seized and possessed thereof in trust, to the extent of one-half part of the said excess, for the benefit of the said Lucy Fayerweather, deceased, widow of the said Daniel B. Fayerweather, and to the extent of the remaining half part of the said excess for the benefit of the defendants Emma S. Fayerweather and Mary W. Achter. In and by the said answer, the said complainant set forth in full the releases, agreements and settlement, referred to in the said bill, in the said complaint and in the said cross-bill, and made in respect to the
619 said releases, agreements and settlement, and in respect to the probate of the said last will and testament, the same allegations as are made in the said bill and cross-bill, to wit, that the same were, and that each of them was, obtained by the defendants Ritch, Bulkley and Vaughan by means of fraud, coercion and deception practiced upon the said Lucy Fayerweather by them; and in and by the said answer, the complainant herein further alleged, and prayed that by the said Supreme Court it might be adjudged and decreed, that the said releases, agreements and settlement were, and that each of them was fraudulent and void, and that they and each of them should be vacated and set aside. In and by the said answer the said complainant denied that the
620 said excess or any part thereof belonged to the said five colleges and other corporations, and denied that the said five colleges and other corporations were, or that any of them was, entitled to receive the same or any portion of the same.

And in and by his said answer the said complainant further prayed in said action as follows:

"That the said defendants Ritch, Bulkley and Vaughan may be required to account for the moneys and property received by them from the estate of said Daniel B. Fayerweather under said last will and testament and codicils, or otherwise, and for the application thereof, and to pay

over the said moneys and property coming in their hands among the parties to this action, according to their several and respective rights therein as the same may be adjudged in this action.

"That the ultimate rights of the parties to this action in the estate of the said Daniel B. Fayerweather be determined and enforced by the judgment in this action, in accordance with the allegations of this answer and the foregoing prayers for relief herein."

The issues raised by the said answer, including the issue as to the validity of the said releases, agreement, deeds, probate and settlement, and including the issue as to the persons or corporations entitled to the estate of the said Daniel B. Fayerweather and to and among whom the same should be paid and distributed by these defendants and the defendant Thomas G. Rich, and each of them, were the same issues which are tendered to the defendants herein by the allegations of the complainant's cross bill. The said issues raised as aforesaid by the said answer and the whole issue in said action were thereafter and on or about the 20th day of January, 1894, regularly brought on for trial, and were tried at a term of the said Supreme Court duly held in and for the County of New York, at which presided Hon. Charles H. Truax, one of the Justices of the said court. Upon such trial the said complainant produced and gave testimony in support of his said allegations, attacking the validity of the said agreements, releases and settlement and the same was duly heard and considered by the said court, and the questions of fact and the questions of law thereby presented were duly urged before the said court for the said complainant by counsel learned in the law and were likewise considered by the said court, and upon the issues so presented, the court thereupon decided in favor of the said five colleges and against the complainant herein; and decided that the said five colleges and other corporations were entitled to the said residuary estate and to the whole thereof and

to the said legacies, and that the said complainant had no interest therein whatever. At the time of the said trial and decision and of the judgment entered thereon the law of the State of New York was, and the statutes of said state provided as follows:

"The decision of the court, or the report of a referee upon the trial of the whole issues of fact, may state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon; or the Court or referee, in deciding the issues, may file a decision stating concisely the grounds upon which such issues have
623 been decided, and direct the judgment to be entered thereon, which decision so filed shall form part of the judgment roll. In an action where the costs are in the discretion of the court, the decision or report must award or deny costs, and if it awards costs it must designate the party to whom costs to be taxed are awarded. Whenever judgment is entered on a decision which does not state separately the facts found, the defeated party may file an exception to such decision, in which case, on an appeal from the judgment entered thereon upon a case containing exceptions, the General Term of the court in which the action is pending shall review all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial,
624 or grant to either party such judgment as such party may be entitled to."

At the request of all parties to the said action, including the said complainant, the said court filed, instead of findings of fact and conclusions of law separately stated, the general decision, which is referred to in the said bill and made a part thereof. In accordance with the direction contained in the said decision, the judgment, which is referred to in the said bill and a copy of which is annexed thereto, was, on or about the 28th day of December, 1894, duly entered and filed in the office of the Clerk of the County of New York, and therein and thereby it

was adjudged that the said residuary estate was held in trust by these defendants and the defendant Thomas G. Ritch for the said Five Colleges and other corporations, as alleged in the said complaint, and therein and thereby it was further adjudged that these defendants and the defendant Thomas G. Ritch should distribute, and they were therein and thereby directed to distribute the said residuary estate as follows, that is to say, to the defendant the Northwestern University, one hundred thousand dollars ($100,000), with its just and equitable proportion of the income, earnings and interest accrued upon the said residuary estate, and the entire remainder of
625 the said residuary estate in equal parts to the said five colleges and other corporations, except the said Northwestern University.

Under the provisions of law aforesaid, the said complainant, on or about the 8th day of January, 1895, filed in the office of the Clerk of the City and County of New York an exception to the said decision, and on or about the 30th day of December, 1894, he duly appealed from said judgment to the General Term of said court. A copy of the complainant's notice of such exception and a copy of his notice of appeal from the said judgment are hereto annexed. The said appeal was upon a case containing exceptions and containing also all the evidence taken upon the trial of the said action. The said appeal
626 on or about the 14th day of May, 1895, duly came on for argument before the said General Term, and for hearing by it, and upon such case and exceptions the said appeal was duly argued before, and duly heard and considered by, the said General Term. Upon such argument and hearing, the said complainant appeared by his said attorneys and counsel learned in the law, who by oral argument and by briefs contended before the said court in support of the allegations contained in his said answer, and against the validity of the said releases and settlement. Upon such argument and hearing of the said appeal, the said General Term had jurisdiction and it was its duty, and the said complainant then claimed and as-

serted that it had the jurisdiction, and that it was its duty, to review and to decide all the questions of law and all the questions of fact involved in the said action, and to decide upon the evidence then before the court that the said releases were invalid. The said General Term, in the exercise of the power and jurisdiction conferred upon it by the said laws and in the discharge of its said duty, and at the solicitation and request of the complainant herein did review and did decide all the questions of law and all the questions of fact presented by the said evidence, record and argument, including the question as to the validity of the said releases, agree-
627 ments and settlement; and the said General Term thereupon decided that the said residuary estate belonged to and should be distributed among the said five colleges and other corporations as provided in the said judgment. At the time of such decision it was the law of the State of New York and the statutes of said State provided as follows:

"A judgment, affirming wholly or partly a judgment, from which an appeal has been taken, shall not, expressly and in terms, award to the respondent, a sum of money, or other relief, which was awarded to him by the judgment so affirmed."

628 And the said General Term thereupon affirmed the said judgment and an order of affirmance and a judgment of affirmance were thereupon duly made and entered. A copy of the opinions of the said General Term rendered upon its said decision, is hereto annexed and is made a part hereof. A copy of the said order of affirmance and a copy of the said judgment of affirmance are hereto annexed and made a part hereof. Thereafter, the said complainant appealed to the Court of Appeals of the State of New York from the said judgment of affirmance. The said Court of Appeals had jurisdiction to correct, and was and is the only court other than the Supreme Court

of the United States having jurisdiction to correct, any error in a judgment or decision of such General Term. The complainant herein, by his said attorneys and counsel, appeared in the said Court of Appeals, and by briefs and oral argument contended before that court, in support of the allegations contained in his said answer against the judgment of affirmance, and against the validity of the said releases, agreement and settlement, and by briefs and oral argument in that court, the said complainant by his said attorneys and counsel contended that the said judgment of the said general term should be modified by setting aside the said releases, agreement and settlement as inequitable and fraudulent and by
629 awarding the said residuary estate and the amount of the said legacies given by the said eighth and ninth clauses, so far as they together exceeded one-half of the estate of the said Daniel B. Fayerweather, to the estate of the said Lucy Fayerweather and to the said defendants Emma S. Fayerweather and Mary W. Achter. Thereupon the said Court of Appeals decided that no error had been committed in the decision of the lower court, affirmed in all respects the said judgment of the said General Term and upon its said decision and the *remittitur* returned by it to the said Supreme Court, a judgment or order, in accordance with said decision, was duly entered in the office of the said clerk. A copy thereof is hereto annexed and made a part hereof.
630 Thereupon and on or about the first day of March, 1897, the said complainant made a motion in the said Court of Appeals to amend the *remittitur* of that court so that it should direct the Justice who presided at the trial of the said action to consider the evidence concerning the said releases, agreement and settlement, the law bearing upon the said evidence, agreement and releases, the questions of law and fact propounded for and against the validity of said agreement and releases, and to determine whether the same were valid and binding or invalid and void. Said motion was made upon an order to show cause, dated the 28th day of January, 1897, the affidavit

of William Blaikie, verified the 28th day of January, 1897, a notice of motion dated February 17th, 1897, and the affidavit of William Blaikie verified the 17th day of February, 1897. The said motion was duly heard and considered by the said court, and after such hearing and consideration was by it denied. Thereafter the reference directed by said judgment was duly brought on for hearing before the referee therein named and upon such hearing the said complainant appeared by his said attorney and participated therein and the said referee thereupon made and filed his report, a copy of which is hereto annexed and made a part hereof. Exceptions to said report, a copy of which exceptions is hereto annexed
631 and made a part hereof; were thereupon filed by the said complainant in the office of the said clerk; and the same were thereupon duly brought on for hearing and a motion was duly made to confirm the said report at a term of the said Supreme Court duly held in and for the County of New York on or about the sixth day of July, 1897. Upon such motion and hearing the said complainant by his attorney duly appeared and opposed the confirmation of the said report. The said court thereupon, after due hearing and consideration, overruled the said exceptions and final judgment, a copy of which is hereto annexed and made a part hereof, was thereupon made and entered in the office of the said clerk on or about the 6th day of July, 1897, wherein and where-
632 by the said report was confirmed by the said Supreme Court and wherein and whereby it was by said court adjudged that the defendant Thomas G. Ritch and these defendants Justus L. Bulkley and Henry B. Vaughan should distribute, and they were thereby directed to distribute, the estate of the said Daniel B. Fayerweather in accordance with the terms of the said first-mentioned judgment; and thereupon these defendants and the defendant Thomas G. Ritch, pursuant to the directions contained in the said judgment, proceeded to pay and distribute, and from time to time thereafter they did pay and distribute, a large part of the estate of the said

Daniel B. Fayerweather to and among the corporations entitled thereto under the said judgment, and such payment and distribution were by them continued down to a time prior to the date when was made herein by the said Emma S. Fayerweather and Mary W. Achter a motion for an order restraining and enjoining these defendants and the defendant Thomas G. Ritch from such payment and distribution. Such motion having been granted and such an order having been made, no such further payment or distribution was made by these defendants and the defendant Thomas G. Ritch until the said order, upon an appeal therefrom, had been reversed by the United
633 States Circuit Court of Appeals and an order of reversal duly entered; whereupon the payment and distribution were by these defendants and the defendant Thomas G. Ritch resumed, and have been from time to time continued down to the present time, as compelled by the said judgment.

All of which matters and things these defendants do aver and plead in bar to the said cross-bill and humbly pray the judgment of this Honorable Court whether they should make any other or further answer to the said bill, hereby pleaded unto as aforesaid.

And these defendants, not waiving their said plea, but wholly relying and insisting thereon, deny all and
634 all manner of fraud, wrongful combination and confederacy wherewith they are by the said bill charged, without this, that any other matter, cause or thing in the said cross-bill contained, material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, traversed, confessed and avoided or denied, is true to the knowledge or belief of these defendants. All which matter and things these defendants are ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable

costs and charges in this behalf most wrongfully sustained.

JUSTUS L. BULKLEY,
H. B. VAUGHAN.

PARSONS, SHEPARD & OGDEN,
Solicitors for the Defendants Justus L. Bulkley and Henry B. Vaughan, Individually and as Trustee, and Executors, 111 Broadway, New York City.

635

636

SOUTHERN DISTRICT OF NEW YORK, } ss.:
County of New York, }

Henry B. Vaughan, being duly sworn, deposes and says: I am one of the defendants herein. I have read the foregoing plea and am familiar with its contents. It is true in point of fact to my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

The said plea is not interposed for delay.

637 JUSTUS L. BULKLEY,
H. B. VAUGHAN.

Sworn to before me this 31st }
day of August, 1899. }

By HENRY B. VAUGHAN.
ROB'T H. HUTCHINGS,
[SEAL]. Notary Public,
N. Y. Co.

I hereby certify that the foregoing plea is in my opinion well founded in point of law.

New York, August 31, 1899.

638 JNO. E. PARSONS.

DISTRICT OF CONNECTICUT, }
County of Hartford, } ss.:

Justus L. Bulkley, being duly sworn, says: I am one of the defendants herein. I have read the foregoing plea and am familiar with its contents. It is true in point of fact to my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

The said plea is not interposed for delay.

JUSTUS L. BULKLEY.

Sworn to before me this 2nd }
day of September, 1899. }

F. L. BURR,
639 Notary Public.

STATE OF CONNECTICUT, }
Hartford County, } ss.:

I, George A. Conant, Clerk of the County of Hartford, and of the Superior Court of said State, within and for said county, which is a Court of Record, and keeper of the seal thereof, do hereby certify that F. L. Burr, Esquire, whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument, was at the time of taking such proof or acknowledgment, a Notary Public within and for said state, dwelling in
640 said county, duly appointed, commissioned and sworn, with authority by the laws of this state to administer oaths for general purposes, and take the acknowledgement of deeds and other instruments to be recorded in this state; that I am well acquainted with his handwriting and verily believe the signature to the said certificate or proof of acknowledgement to be genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and Seal of said Superior Court, at Hartford, in said county, this 2nd day of Sept., A. D., 1899.

GEORGE A. CONANT,
[SEAL.] Clerk.

Plea and answer of Defendants Bulkley and Vaughan individually and as Executors, &c., to the cross-bill of J. B. Reynolds, as Executor, &c.

The exhibits referred to in said plea and answer will be found in appendix of exhibits, as follows:

Exception by Complainants..... 10—14
Notice of Appeal to General Term..... 15—20
Opinions of the General Term in Five-College action..... 54—59
641 Order of Affirmance..... 60—62
Judgment on Affirmance..... 63—69
Referee's Report.....153—159
Order of Judge Beach on Remittitur.....165—166
Final Judgment by Pryor, J.....167

UNITED STATES CIRCUIT COURT.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CONSENT TO FILE REPLICATION TO PLEAS OF AMHERST AND WILLIAMS COLLEGE TO CROSS-BILL NUNC PRO TUNC.

643

JOHN B. REYNOLDS, as Sole Executor of the estate of Lucy Fayerweather, deceased
Complainant,
against
THOMAS G. RITCH, etc., and others,
Defendants.

In Equity No. 6675

644

We hereby consent that said complainant may file his replication to the pleas filed by us herein on or about November 27th, 1901, to his cross-bill, *nunc pro tunc* as of the January Rule Day, 1902, with like force and effect as if filed upon said Rule Day.

Dated New York, June 11, 1902.

(Signed) JAMES L. BISHOP,
Solicitor for Defendant,
The Trustees of Amherst College.

(Signed) W. B. PUTNEY,
Solicitor for Defendant,
President and Trustees of Williams College.

UNITED STATES CIRCUIT COURT.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLICATION TO THE PLEAS OF AMHERST AND WILLIAMS COLLEGES TO THE CROSS-BILL OF J. B. REYNOLDS, ETC.

645

JOHN B. REYNOLDS as sole Executor, &c., of Lucy Fayerweather, deceased,
Complainant,
against
THOMAS G. RITCH, etc., and others,
Defendants.

In Equity No. 6675

646

The cross-complainant, John B. Reynolds, as sole executor of the last will and codicils of Lucy Fayerweather, deceased, repliant, for this his replication to the pleas and answers of the defendant the Trustees of Amherst College and the President and Trustees of Williams College, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said pleas and the answers, for replication thereto, says, that he will aver and prove his said cross-bill to be true, certain and sufficient in the law to be answered unto; and that the said pleas and answers are uncertain, untrue and insufficient to be

replied to by this cross-complainant; without this, that any other matter or thing whatsoever in the said plea and answers contained, material or effectual in the law to be replied to confessed and avoided, traversed or denied, is true to the knowledge or belief of this cross-complainant; all which matters and things this replicant is and will be ready to aver and prove, as this Honorable Court shall direct, and humbly prays, as in and by his said cross-bill he has already prayed.

WILLIAM BLAKER,

Solicitor and counsel for defendant
John B. Reynolds as executor of
647 *Lucy Fayerweather, deceased.*

Dated, New York, June 11th, 1902.

648

CIRCUIT COURT OF THE UNITED STATES

For the Southern District of New York.

In Equity.

DEMURRER OF DEFENDANT THE UNIVERSITY OF ROCHESTER TO BILL OF COMPLAINT.

vs.

John B. Reynolds, as sole Executor of the Estate of Lucy Fayerweather, deceased,
Complainant,
against
Isaac G. Reed, etc., et al.,
Defendants.

In Equity No. [illegible]

The demurrer of Rochester University, a defendant to the bill of complaint of John B. Reynolds, as sole executor of the estate of Lucy Fayerweather, deceased.

The defendant the University of Rochester, by protestation, not confessing all or any of the matters and things in the complainants' bill of complaint contained to be true, in such manner and form as may be therein set forth and alleged doth demur thereto and for cause of demurrer shows:

1.—That the bill of complaint is not a proper cross bill of complaint to the bill of complaint exhibited by Simon S. Fayerweather and Mary W. Arthur against the

defendant with others referred to in the said cross-bill, because the same is not germane to the cause of action set forth in the said original bill of complaint, and because the complainant in said cross-bill has no standing or right to file said cross-bill.

2.—That the said complainant has not in and by said bill made or stated such a cause of action as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for.

3.—That the complainant hath not in and by his said bill made or stated such a case as entitles him in a court of equity to any discovery from this defendant or to
651 any relief against or as to the matters contained in said bill.

4.—That this court has no jurisdiction to grant the relief prayed for adjudging the will therein set forth as Exhibit A to be the last will and testament of Daniel B. Fayerweather.

5.—That this court is without jurisdiction to declare the decree of the Surrogate's Court admitting the will and codicils of Daniel B. Fayerweather to probate null and void.

6.—That no right of action exists in complainants upon the facts stated in the complaint to the relief prayed for, for, or any part thereof.

Wherefore and for divers good causes of demurrer
652 appearing in the said defendant does demur thereto, and humbly prays the judgment of this Honorable Court whether it shall be compelled to make any further answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most unjustly sustained.

SETH SPRAGUE TERRY,
Solicitor for University of Rochester.

I hereby certify the above demurrer is in my opinion well founded in point of law.

SETH SPRAGUE TERRY,
Solicitor and counsel for defendant University of Rochester.

STATE OF NEW YORK,)
Southern District of New York) ss.:

John P. Munn, being sworn, deposes and says: I am one of the Trustees of the University of Rochester one of the above defendants. The above demurrer is not interposed for delay.

JOHN P. MUNN.

Sworn to before me this 24th)
day of March, 1902.)

WM. A. ELLIS,
Notary Public,
New York County.

653

654

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CROSS-BILL OF JOSHUA M. FIERO.

655

JOSHUA M FIERO,
Cross Complainant.
against
THOMAS G RITCH and others,
Defendants.

In Equity No. 6675.

656

To the Judges of the Circuit Court of the United States for the Southern District of New York:

Joshua M. Fiero, a defendant in the suit in equity heretofore and an or about June 1st, 1897, begun in this court before your Honors, by Emma S. Fayerweather and another against Thomas G. Ritch and others, so made defendant by the cross-bill filed by John B. Reynolds, as sole executor of the last will and testament and the codicil thereto of Lucy Fayerweather, deceased, brings, and with his answer to said cross-bill files, this, his cross-bill of complaint against Thomas G. Ritch, individually and as executor of, and trustee under, the alleged last will and testament and the codicils thereto, of Daniel B. Fayerweather, deceased; Justus L. Bulkley, individually

and as such executor and trustee; Henry B. Vaughan, individually and as such executor and trustee; the trustees of Princeton University, a corporation created and existing under the laws of the State of New Jersey; the Northwestern University, a corporation created and existing under the laws of the State of Illinois; the Presbyterian Hospital in the City of New York, Saint Luke's Hospital in the City of New York; the Manhattan Eye and Ear Infirmary in the City of New York, the Woman's Hospital in the State of New York, the Mount Sinai Hospital in the City of New York, the Trustees of Union College in the Town of Schenectady
657 in the State of New York, domestic corporations, created and existing under the laws of the State of New York; the President and Trustees of Bowdoin College, a corporation created and existing under the laws of the State of Massachusetts; the Trustees of Dartmouth College, a corporation created and existing under the laws of New Hampshire; the President and Trustees of Williams College, the Trustees of Amherst College, corporations created and existing under the laws of the Commonwealth of Massachusetts; Wesleyan University at Middletown, Connecticut, the President and Fellows of Yale College, in New Haven, Connecticut, Trinity College at Hartford, Connecticut, corporations created and existing under the laws of the State of
658 Connecticut; the Trustees of the Columbia College in the City of New York, the Union Theological Seminary in the City of New York, the Trustees of Hamilton College, the University of Rochester, Cornell University, domestic corporations created and existing under the laws of the State of New York; Lafayette College, Lincoln University, corporations created and existing under the laws of the State of Pennsylvania; the Rector and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, the Randolph and Macon College at Boydton, Mecklenburg County, Virginia, corporations created and existing under the laws of the State of Virginia; Maryville

College, a corporation created and existing under the laws of the State of Tennessee; Marietta College, the Adelbert College of the Western Reserve University, corporations created and existing under the laws of the State of Ohio; Wabash College, a corporation created and existing under the laws of the State of Indiana; Park College, a corporation created and existing under the laws of the State of Missouri; Emma S. Fayerweather, Mary W. Achter, Anner A. Reynolds, Lucy J. Beardsley, all of whom save the Trustees of Princeton University are defendants in the said cross-bill filed by said John B. Reynolds and John B Reynolds, the
659 complainant therein.

And thereupon your orator complains and says that:

This suit was brought to maintain a claim of next of kin of Daniel B. Fayerweather, deceased, that they and his widow were entitled, nothwithstanding colorable testamentary disposition, to part or the whole of the estate of which he died possessed and for equitable relief thereupon. There was at the time of the filing of the original bill of complaint in the suit so instituted herein by said Emma S. Fayerweather and another, and there still is, within the Southern District of New York, real and personal property, the estate of Daniel B.
660 Fayerweather, deceased, to the amount of upwards of six millions of dollars in value, and inasmuch as said Daniel B. Fayerweather was until his death a citizen and resident of the State of New York, and an inhabitantof the city and county of New York and of the Southern District of New York, the administration and distribution of his estate was within the jurisdiction of the Surrogate of the County of New York, and by a decree upon this cross-bill will be within the jurisdiction of this court.

The original cause upon said bill of complaint filed by said Emma S. Fayerweather and another and upon the said cross-bill filed by said John B. Reynolds, is pending

in this court, undetermined upon replication to pleas of some defendants and upon replications to answers of other defendants. As between said parties and your orator the cause is not at issue, but tenders issue by filing herewith his answer to said cross-bill of said Reynolds, his time so to do not having as yet expired.

Nor is the taking of testimony closed as between any of the parties to said cause; but, while much testimony has been taken which has informed your orator of the various matters and things herein charged, of which except the existence of the wills, codicils and decrees, he was before ignorant, nevertheless other parties to
661 said causes are still engaged in taking further testimony and are proceeding under extensions of time duly granted by this court and notices served thereunder and the cause cannot in due course come on for final hearing before the time when your orator can be ready on his part therefor, which he offers to be; also offering to consent to any direction of the court to speed the cause and praying that due order may be made that this, his cross-bill, may be heard with the principal cause and with the cross-bill of said John B. Reynolds.

Your orator was by the last will and testament of said Daniel B. Fayerweather, by him in his life time, on the 2nd day of October, 1880, duly made, signed, sealed, published and declared, appointed an executor there-
662 of, with power therein set forth, which said will and testament is, to the best of the knowledge, information and belief of your orator, now in the possession of the defendant, Thomas G. Ritch, unrevoked and uncancelled; but if the same be not in his possession, then your orator is ignorant where the same may be and alleges that it is lost and that due proof thereof as a lost will should be taken, which he prays may be done and, thereupon, that it shall be by decree herein established. A copy of the said last will is annexed to the cross-bill of complaint filed by said John B. Reynolds, herein, and your orator refers thereto as if the same were unto this his cross-bill exhibited.

Your orator further alleges that, if it shall appear that said last will and testament is lost or cancelled or cannot be established for any reason, then and in that case your orater was, by the last will and testament of said Daniel B. Fayerweather, by him in his lifetime, on the 9th day of August 1878, duly made, signed, sealed, published and declared, appointed an executor thereof, with the powers therein set forth, which said will and testament is now in the possession of your orator unrevoked and uncancelled and he hereby makes profert thereof and annexes a copy thereof to this, his cross-bill, and the same is marked

Exhibit A. The persons named in said wills of 1880
663 and 1878, as coexecutors with your orator, thereof,

except the defendant Justus L. Bulkley, died before the commencement of this suit. The devisees of said wills, other than the individuals therein named, are benevolent, charitable, literary, scientific, religious or missionary societies, associations or corporations. The persons and corporations made by this cross-bill defendants have or claim to have divers interests, according to the purport of the said testamentary papers, or by reason of the probate of the papers hereinafter mentioned, by and before the Surrogate of the County of New York, in or to the said estate of said Daniel B. Fayerweather, or some part thereof, as will more particularly appear by

reference to said wills, testamentary papers and
664 decrees of probate, to which your orator begs leave

to refer as if the same were particularly and at large herein set forth.

Further alleging your orator charges that the defendants Thomas G. Fitch, Justus L. Bulkley and Henry B. Vaughan, procured from the Surrogate of the County of New York, two certain orders or decrees, copies of which are hereunto annexed, marked respectively Exhibits B and C, which purport to establish as the last will and testament of said Daniel B. Fayerweather, a paper purporting to have been executed October 6th, 1884, as his will, and four other papers purporting to have been executed, respectively, December 13th, 1884, January 7th, 1888,

March 19th, 1889, and November 15th, 1890, as codicils thereto, under and by color of which decree, the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan have procured and taken possession of the entire estate of said Daniel B. Fayerweather, aforesaid, and have either paid it away to the other defendant or some of them, or still have it within their possession, control or power.

Your orator has been first informed by the testimony adduced herein by other parties to this suit, and did not previously know the facts following which he charged to be true.

665 And said decrees were obtained by the suppression of facts, untrue representation of facts, contrivances, devices, imposition practiced upon the said Surrogate and the parties, and other improper means, hereinafter set forth, so that the said decree ought to be annulled, vacated and set aside, and the parties hereto forever enjoined from setting them or either of them up, or claiming any right, title or advantage under them, that is to say:

By an instrument duly executed on the 11th day of November, 1890, said Daniel B. Fayerweather had cancelled the said testamentary papers prior to that dated November 15th, 1890, except the said wills executed in 1878 and 1880.

666 The said paper purporting to be executed on November 15th, 1890, whereby the other papers, to wit: The will of 1884 and its codicils were in form reaffirmed and republished, was not, and the said defendants well knew that it was not the act of said Daniel B. Fayerweather, but was made when he was in a comatose and dying condition and incapable of understanding the nature or effect of said paper.

He had given instructions which were reduced to writing, and which remained in the exclusive possession of said defendants, unknown to the other parties to said probate proceeding for the preparation of the codicil of a purport and effect wholly different from, and in conflict

with, said paper, and he was awaiting its preparation in conformity with his directions; but the said defendants, the premises well knowing took advantage of the access to him which they obtained upon the pretence of bringing for execution a codicil in accordance with his said directions, and also took advantage of the fact that he had then passed beyond the condition of testamentary competency, to obtain his signature to said paper so probated as a codicil of November 15th, 1890, compelling and guiding his unconscious hand to hold a pen which was in the control and represented the mental act and

will of a clerk, acting by their procurement and at
667 their instigation and thereby put his name to said

codicil, to effectuate their will and not that of the said Daniel B. Fayerweather. The apparent effect of said codicil was to give absolutely the said defendants upwards of $3,000,000. Not only did the said defendants withhold and conceal from said Surrogate the circumstances aforesaid actually attending the execution of said paper, and the divergence between said codicil and the instructions therefor; but they withheld and concealed from said surrogate and from the parties to said proceeding, some of whom were opposing the said probate, the fact of the existence and contents of said writing wherein said instructions were as aforesaid, set down,

while at the same time they were holding out and
668 pretending to said surrogate and said parties, that

they were making and had made full disclosure of all the circumstances of the execution of said paper, and all writings having any relevancy in the premises, and thereby procuring the inaction and nullifying the opposition of the other parties.

If the circumstances which were proved before the surrogate in said proceeding, tending to show that the said paper of November 15th, 1890, was not the free and conscious act of said Daniel B. Fayerweather, had been illuminated and further confirmed by the facts so suppressed, and by the conflict shown by said writing, between the codicil and the instructions which were the

occasion for any codicil then to be executed, and it had appeared by the disclosure of said instructions and the production of said writing it would have appeared that that the said codicil was unduly procured by the defendants, and actively by the defendant Henry B. Vaughan, while he was in a position of confidence towards said Daniel B. Fayerweather, while he controlled his household, while he was receiving unthinking compliance on the part of said Fayerweather and his household with every request which said Vaughan made, while he was scheming to benefit himself by seizing upon these circumstances to obtain the signature of said dying man to a gift to
669 said Vaughan of over $1,000,000, so far as he was concerned; and so far as the said three defendants, executors, were concerned, the procurement of said signature to said paper having the effect to reinstate them as executors, from which places they had been displaced by said instrument executed November 11th, 1890, and to give them the commissions, benefits, and advantages arising from that relation to an estate of upwards of $6,000,000, and to enable them to claim $3,000,000 thereof as their own, then and in that case, your orator charges, the said decrees establishing said will and codicils could not and would not have been made. Your orator further charges and alleges that by the purport and effect of said will of 1884 more than $3,000,000
670 in excess of one half of the estate of which said Daniel B. Fayerweather died possessed after the payment of his debts, was devised and given to corporations and institutions in disregard and violation of chapter 360 of the laws of the State of New York passed in 1860, to wit, to benevolent, charitable, literary, scientific, religious and missionary societies, associations and corporations, the said Daniel B. Fayerweather having a wife him surviving; and that said Fayerweather, when he executed said will, was clearly advised and well knew that the said devises were in conflict, to the extent of one-half thereof, with said statute, and that at the suit of his said wife and the defendants Emma S. Fayerweather, Mary

W. Achter and Lucy J. Beardsley, who were nieces of said Fayerweather, or either of them, a court of competent jurisdiction could and would declare and adjudge that such devises were so illegal and null, and that said wife and next of kin were entitled to distributive shares of so much of said estate as should exceed one half of such devises, under the statute of the State of New York, as in case of intestacy.

But said Daniel B. Fayerweather, desiring notwithstanding said statute to make effectual said devises, and with the purpose of accomplishing his desire by a method
which would defeat the statute and conceal its viola-
672 tion, and in order to defeat, hinder and delay said
wife and said next of kin in any effort to set up and sustain the prescription of said statute, by concert and agreement with defendant Thomas G. Ritch, executed the said will of 1884, with the understanding that after the expiration of sixty days, the time which he believed by force of the statute of the State of New York the devises to such corporations and societies in said will made must have been existent in order to take effect even in part, he would dispose of his estate in excess of one half by the form of a codicil devising it absolutely to his executors or some of them, upon a secret trust, which the said Ritch agreed to for himself and the defendant
Bulkley, whereby they should conceal and deny that
673 any trust existed and that the devises to them were
not in fact, as they were in form, absolute, but should nevertheless, be transfers and conveyances in the exercise of the legal title so conferred upon them, make the same disposition of said estate as the said will of 1884 directed upon its face.

In pursuance of this concert and agreement and to effectuate it, the paper aforesaid, executed December 13th, 1884, which made such agreed disposition, was made and published. The said probate papers, other than said will and codicil of November 15th, 1890, executed by said Daniel B. Fayerweather subsequently to December 13th, 1884, were only incidents to said will

and would not have been made but as incident thereto; and unless the said will is valid, are null and void.

The said Fayerweather died on the 15th day of November, 1890, in the city of New York.

Thereupon to effectuate said concert and agreement said defendants Ritch, Bulkley and Vaughan, for a time held out that they held said estate in their own right as absolute devisees, to the extent of one half thereof, and they withheld from the surrogate and from the parties to the proceedings before him upon the probate aforesaid,

the facts aforesaid and the proofs thereof which were 674 in their exclusive power and control, and they then

and there denied that they held said estate or any part thereof subject to said trust or secret agreement, and thereby and otherwise, as hereinabove set forth they obtained the probate of said testamentary papers, and the decrees aforesaid; whereas, had the said facts been disclosed, said scheme, including said will and codicils, would have appeared to be, as they were, null and void, as an imposition upon the statute of wills, and an attempt to use the forms of that statute to defeat its substance and to conceal its violation; and your orator charges that said probate so obtained should for the reason aforesaid be annulled and the parties hereto en-

joined from setting up or taking any advantage from 675 said decrees, and that the said will of 1880, or, in

the alternative, that of 1878, be established as the last will and testament of said Daniel B. Fayerweather, in so far as it may, under said statute of wills, be established, and that, as to the residuum, the estate be decreed to be disposed of as in case of intestacy.

Wherefore, your orator prays that he may have the relief aforesaid and such other and general relief as may be equitable; that a receiver may be appointed during the pendency of this suit to take and hold the property affected thereby; that the several defendants be required to account for such moneys and property as they or any of them may have received constituting the estate of said

Daniel H. Fayerweather, and required to pay the same over to your orator as executor of the will established, that the rights of the several parties to distribution of said estate be settled by decree herein; that it be adjudged that your orator is the sole, qualified executor of the last will and testament of Daniel H. Fayerweather and is entitled to exercise all power conferred by said will and by law, and to have the benefit of such commissions and advantages as appertain to such executor; and he may have an injunction against the defendants to command them not to dispose of, alienate, convey or transfer any of the property aforesaid, and not to remove any such property out of the jurisdiction of this court; and that this court reserve the power to make such further directions at the foot of its decree as may be useful, convenient or necessary for its enforcement.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief prayed herein, may it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America to be directed to said defendants, and each of them, thereby commanding them, at a certain day and under a certain pain, to be specified, personally to appear before your honors in this honorable court, and then and there to answer all and singular the premises, answer upon oath being waived, and to stand to, abide and perform such order and decree therein as equity may require, and as to your honors shall seem meet.

ROGER M. SHERMAN,
Solicitor and of Counsel for
Complainant.

State of New York,)
County of New York,) ss.:
Southern District of New York,)

Judson M. Piano, being duly sworn, deposes and says that he is the complainant aforesaid; that said cross bill is true to the best of the knowledge, information and belief of deponent.

(Signed)

Judson M. Piano.

[illegible]

Sworn to before me this)
day of September, 1911.)

(Signed)

W. A. Piano,
Notary Public for Kings County.

Certificate filed in New York County.

Exhibit B, referred to in said cross bill, will be found in Appendix of Exhibits, pages [illegible]

Exhibit C, referred to in said cross bill, will be found in Appendix of Exhibits, page [illegible]

[illegible]

IN THE UNITED STATES CIRCUIT COURT.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN B. REYNOLDS, Sole Executor of the estate of Lucy Fayerweather, deceased,
COMPLAINANT,

679 *against*

THOMAS G. RITCH, &c., and others,
DEFENDANTS.

In Equity No. 6675

To the Judges of the United States Circuit Court for the Southern District of New York:

The defendant, Joshua M. Fiero, for his answer to the cross-bill of complaint filed herein by John B. Reynolds, as Executor of the last Will and Testament of Lucy Fayerweather, deceased, alleges:

680

He admits and says that it is true to the best of his knowledge, information and belief, except that he is informed and believes that it is not true, and therefore he denies that it was not the intention of Daniel B. Fayerweather to make any such will, as alleged in said cross-bill, and that he did not understand the same or the first three codicils thereto, or their legal effect, and that he relied upon the advice and representations of the defendant Thomas G. Ritch, with the discretion conferred on said Ritch by said will and devise to make of the residuary estate, was a lawful mode of effectuating the wishes of said Daniel B. Fayerweather, and that said

Fayerweather was defrauded and so far that he was ignorant that the provisions aforesaid were void in violation of the statute; but on the contrary thereto your orator answers upon information and belief that said Daniel B. Fayerweather well knew that said provisions were in violation of said statute and that the same would be adjudged void if the truth in respect thereto should be disclosed, and that he made said will and said codicils with the intention not only to effectuate the said wishes in despite of the statute, but to conceal the violation by the mode described in the said cross-bill and the secret trust to which the title by him conferred in said
681 codicil should be actually subjected.

Your orator further denies that the said Daniel B. Fayerweather first knew and for days before his death what the legal effect of Exhibit D and its codicils was; that he then attempted to execute or publish a codicil to said Exhibit D to annul the same in part; that no such codicil exists or is in the possession or power of the defendant Henry B. Vaughan.

(Signed.) JOSHUA M. FIERO.

ROGER M. SHERMAN,
Solicitor and of Counsel.

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STATE OF NEW YORK, }
County of New York, } ss.:

Joshua M. Fiero, being duly sworn, deposes and says that he is the defendant aforesaid; that the foregoing answer is true to the best of his knowledge, information and belief.

(Signed.) JOSHUA M. FIERO.

Sworn to before me this 2nd }
day of October, 1901. }

(Signed.) SIMEON B. CHITTENDEN,
683 Notary Public,
Kings Co.
Certificate filed in N. Y. County.

684

CIRCUIT COURT OF THE UNITED STATES.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOSHUA M. FIERO,
COMPLAINANT
685 *against*
THOMAS G. RITCH and others,
DEFENDANTS

In Equity No. 6675
Cross-Bill of
Joshua M. Fiero.

Sir:—

Please take notice that upon the original bill filed by Emma S. Fayerweather and another against Ritch and others, and upon the cross-bill filed by the cross-complainant herein, a motion will be made before this Court at a stated term thereof, to be held at the Post Office building, in the Borough of Manhattan, City of New York, at 11 A. M., on the 15th of November, 1901, for an order herein removing and striking out from the files of this Court the cross-bill filed by Joshua
686 M. Fiero, upon the following grounds:

First—That no order of this Court has ever been made authorizing or permitting the same to be filed or served.

Second—That it was filed by a person who is not a defendant to the original bill in equity pending in this cause.

Third—That the subject matter of the cross-bill is not the same as the subject matter of the original bill.

Fourth—That it introduces new and distinct matters not embraced in the original bill.

Fifth—That it is not auxiliary and ancillary to the proceedings in the original bill and a dependency of it.

Sixth—That it introduces new parties not introduced into the cause by the original cross-bill.

Seventh—That the cross-bill is not a cross-bill and is not germane to the original bill; for such order and relief as may be just.

Yours, etc.,

C. N. BOVEE, JR.,
Solicitor
for
687 THOMAS G. RITCH,
Executor,
and others.

To
ROGER M. SHERMAN, Esq.,
Solicitor
for
J. M. FIERO,
Cross-complainant.

688

At a Stated Term of the United States Circuit Court for the Southern District of New York, held at the Post Office building in the Borough of Manhattan, City of New York, on the 17th day of January, 1902.

Present:—Honorable E. HENRY LACOMBE,
Circuit Judge.

EMMA S. FAYERWEATHER and another,
689 COMPLAINANT

against

THOMAS G. RITCH and others,
DEFENDANTS

JOSHUA M. FIERO,
CROSS-COMPLAINANT

against

THOMAS G. RITCH and others,
DEFENDANTS

690

In Equity No. 6675.

The cross-bill of complaint having been filed herein with the answer of the said Joshua M. Fiero to the cross-bill filed by John B. Reynolds, as executor, and subpœnas having been duly served thereunder upon the following named parties, defendants, to wit: Thomas G. Ritch, Justus L. Bulkley, Henry B. Vaughan, Manhattan Eye and Ear Infirmary in the City of New York, the Union Theological Seminary in the City of New York, and thereupon the motion coming on to be heard upon the part of said defendants and of the Trustees of Hamil-

ton College, defendant, now upon the original bill and the cross-bill of J. B. Reynolds, as executor, and said answer and the cross-bill of said Joshua M. Fiero after hearing John E. Parsons, Esq., counsel for defendants Bulkley and Vaughan, James L. Bishop, Esq., of counsel for defendant the Union Theological Seminary in the City of New York, Henry L. Stimson, Esq., of counsel for the defendant the Trustees of Hamilton College, C. N. Bovee, Esq., of counsel for the defendants Ritch and the Manhattan Eye and Ear Infirmary, in support of the motion, and Roger M. Sherman, Esq., of counsel for Joshua M. Fiero, cross-complainant, and William
691 Blaikie of counsel for the original complainants, and for J. B. Reynolds, as executor, complainant in the said cross-bill, opposed, now

UPON MOTION of the solicitors for the above named defendants making the motion, it is

ORDERED, that said cross-bill of said Joshua M. Fiero be and the same is dismissed and stricken from the files of this Court upon the sole ground that this Court has no jurisdiction to grant the relief prayed for in the said cross-bill or any part of said relief.

(Signed.) E. HENRY LACOMBE,
U. S. Circuit Judge.

692

UNITED STATES CIRCUIT COURT

SOUTHERN DISTRICT OF NEW YORK

EMMA S. FAYERWEATHER and MARY W. ACHTER 693 *Complainants* *against* THOMAS G. RITCH, individually and as Trustees and Executor of the Last Will and Testament of Daniel B. Fayerweather, deceased, and others, *Defendants*	**In Equity.**

Before JOHN A. SHIELDS, Esq., Examiner.

New York, September 28, 1898.

694 Testimony taken on behalf of the complainants, under the 67th rule in equity upon the issue joined upon the replication of the complainants to the plea and answer of the defendant Hamilton College.

APPEARANCES:

ROGER M. SHERMAN, Esq.
Solicitor for Complainants.

WILLIAM BLAIKEE, Esq.,
Solicitor for John B. Reynolds, as executor of the last will and testament of Lucy Fayerweather, deceased.

Messrs. Root, Howard, Winthrop & Stimson,
Solicitors for the defendants, Trustees of Hamilton College.

Arthur C. Hume, Esq., and James L. Bishop, Esq.,
of Counsel.

Mr. Hume: I wish to make an application for an adjournment of the taking of testimony upon the ground of Mr. Root's unavoidable absence from the city at the present time.

Mr. Sherman: I think we had better go on. I
695 will reserve all rights to Mr. Root.

Mr. Hume: In behalf of this application, I wish to say that Mr. Root has been of counsel all the way through this litigation, and I feel that at the present time when the testimony is taken he ought to be here.

The Examiner: You insist that the examination proceed?

Mr. Sherman: Yes.

The Examiner rules that the direct testimony of the witness may be proceeded with, Mr. Root to have the right to hereafter object to each and every question the same as if he was present, and that the witnesses be produced hereafter for cross-examination immediately on his return.

696

UNITED STATES CIRCUIT COURT

SOUTHERN DISTRICT OF NEW YORK

EMMA S. FAYERWEATHER and MARY W. ACHTER
697 *Complainants*

against

THOMAS G. RITCH, individually and as Trustee and Executor of the Last Will and Testament of Daniel B. Fayerweather, deceased, and others,
Defendants

In Equity.

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APPEARANCES:

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Solicitor for Complainants.

WILLIAM BLAIKEE, Esq.,
Solicitor for John B. Reynolds, as executor of the last will and testament of Lucy Fayerweather, deceased.

Messrs. ROOT, HOWARD, WINTHROP & STIMSON,
Solicitors for the Defendants, Trustees of Hamilton College.

ARTHUR C. HUME, Esq., and JAMES L. BISHOP, Esq.,
of Counsel.

Mr. Hume: I wish to make an application for an adjournment of the taking of testimony, upon the ground of Mr. Root's unavoidable absence from the city at the present time.

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Mr. Sherman: Yes.

The Examiner rules that the direct testimony of the witness may be proceeded with, Mr. Root to have the right to hereafter object to each and every question the same as if he was present, and that the witnesses be produced hereafter for cross-examination immediately
700 on his return.

PRESCOTT HALL BUTLER, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Sherman.

1 Q. Mr. Butler, you are a member of the bar of the State of New York?

A. Yes.

2 Q. And you have been for a number of years?

A. Twenty odd years, yes.

3 Q. And you are a member of the law firm of Evarts, Choate & Beeman?

A. Yes.

4 Q. And you were a member of that firm in November, 1890?

A. Yes.

5 Q. Do you know Henry B. Vaughan?

A. Yes.

6 Q. How long have you known him?

A. I do not remember; I should say fifteen years or more.

701 7 Q. He has been a client of your law firm for some time prior to November, 1890, since some time prior to November, 1890?

A. I have only known he was a client.

8 Q. Since a time prior to that?

A. Prior to 1890, yes; as long as I have known him, I have known him as a client, nothing else.

9 Q. Did such business as your firm did for him come into your hands practically at any time?

A. I cannot answer that; I have done business for him as a lawyer.

10 Q. Prior to November, 1890?

A. Yes.

11 Q. On or about the 10th day of November, 1890, did you have an interview with Mr. Vaughan in
702 reference to a contemplated will or codicil to be executed by Mr. Daniel B. Fayerweather?

Mr. Hume: I object to that as incompetent, irrelevant and immaterial. I object to it on the further ground as not calling for any evidence on the issues raised by the pleadings.

A. The date that you mention recalls nothing particular to my mind. As to the remainder of the question, I decline to answer it on the ground of professional privilege.

12 Q. Whose professional privilege?

A. My own.

13 Q. You understand that the privilege is one to the client and not to the attorney?

A. I do not intend to discuss the matter with you, Mr. Sherman.

Mr. Sherman: I will ask the Examiner to certify to the Court the contumacy of the witness, so that I may make the proper motion.

The Examiner states that he will certify the record to the Court.

14 Q. Did you on or about the 10th day of November, 1890, upon the request of Henry B. Vaughan and from writings furnished by him, draft what purported to be a codicil, or proposed codicil, to the will of Daniel B. Fayerweather?

703 Mr. Bishop: That is objected to upon the ground that it is incompetent and immaterial, and calls for no testimony competent or material under the issues raised by the pleadings in the case.

A. The date which you mention recalls nothing particular to my mind. Apart from the date, I can answer no.

15 Q. Did you, on or about the 10th day of November, 1890, prepare a draft or proposed codicil to the will of Mr. Daniel B. Fayerweather and deliver it to Mr. Vaughan?

Mr. Bishop: Objected to. It is not necessary that I should repeat the objection every time. I object to it upon the same grounds, as incompetent, irrelevant

704 and immaterial.

Mr. Sherman: The right is reserved to Mr. Root to put in any objections at the next hearing with the same force and effect as if they had been put in now. If in addition to that you are going to conduct the matter and object to every question, then I withdraw my acquiesence to that mode.

Mr. Bishop: I think I will take my objections now.

Mr. Sherman: Then I will withdraw my consent to the arrangement that Mr. Root interpose subsequent objections; Mr. Bishop taking the responsibility of putting in objections now, I will not consent that they be supplemented hereafter.

The Examiner: I will let it stand, in view of the fact that Mr. Root has made an application for an adjournment. Mr. Root may want to add to the objections.

Mr. Sherman: In view of the fact that when I consented to reserve the right to Mr. Root to make objections, in the form at the head of the deposition, and that Mr. Bishop had not announced his appearance as counsel, but has since done so and is acting as counsel and interposing objections at this time, I withdraw my consent and acquiescence in the direction made by the Examiner reserving to Mr. Root that right, and contend that without the consent the Examiner has no such power.

705 Question repeated.

Mr. Bishop: The question is objected to as incompetent, irrelevant and immaterial, and upon the ground that it calls for no evidence competent or material under the issues raised by the plea and replication.

A. The date mentioned brings no particular fact of the matter to my recollection. Whatever connection I had with Mr. Fayerweather or with Mr. Vaughan at or about that time was as lawyer and client, was that relation existing between lawyer and client; I had none other whatever, and I decline therefore, on the ground of professional privilege to answer the question.

16 Q. At the time of the act inquired of, had you ever seen or had any business relations with Daniel

706 B. Fayerweather.

Mr. Bishop: Objected to as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I have not stated that the thing called "the act inquired of" ever existed. At or about the time mentioned, I had a personal interview with Mr. Fayerweather as his lawyer.

17 Q. I am now inquiring of a time prior to the 11th day of November, 1890, and prior to the execution of any codicil drawn by you, and I ask you whether, prior to the 11th day of November, 1890, you had ever done any

business for Daniel Fayerweather, or had ever seen him?

Mr. Bishop: Objected to upon all the grounds stated in regard to the previous question. Now, if you choose to put on the record a consent, that objection shall be taken in that form to every question—

Mr. Sherman: I have already given Mr. Root every opportunity to object.

Mr. Bishop: You have withdrawn it.

Mr. Sherman: Because you are objecting.

Mr. Bishop: Then I will put the objection down in the same form which I have put it to the previous question. I object to it as incompetent, irrelevant and
707 immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Mr. Fayerweather had, according to my best recollection, been a client of my law firm for some years prior to that time, and was then a client of the office. I personally saw Mr. Fayerweather at his house in Fifty-seventh street on the occasion of the execution of a paper. This was once only, and was, I believe, and was, according to my present recollection, some weeks before his death. Whenever it was, it was only once that I saw him, and I saw him there at his house. I had never seen him personally before, and never saw him afterwards.

18 Q Do you wish to be understood as saying that
708 Mr. Fayerweather's having been previously a client of your firm raised between you the relation of attorney and client in reference to the transaction about which I am inquiring, so as to seal your lips by the professional privilege, although at that time Mr. Fayerweather had not directly employed you in this matter?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not catch the meaning of the question. I do not mean to be understood otherwise than what I have stated.

19 Q. I am seeking to learn with formal regularity of a question, whether you consider this silence to be caused by a professional relation to Mr. Fayerweather then existing, or by a professional relation with Mr. Vaughan then existing?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Both.

20 Q. So far as Mr. Fayerweather was concerned, was not your professional relation with him created by his
709 adoption of the paper which you took to his house on or about the 11th day of November, 1890; I refer to the paper which was executed at his house?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not so understand it, and if you will permit me, Mr. Sherman, I will state the facts as far as I understand my professional obligation permits me.

21 Q. Certainly.

A. I want you to understand now that except for that, I have no objection whatsoever to stating every-
thing that occurred, but I have a very great objec-
710 tion to opening the door to disclosing matters that occurred in my private office. Mr. Vaughan came to my office to consult with me as a client upon matters practically relating to himself. I had such a consultation with Mr. Vaughan in my private office. At the same time Mr. Vaughan, as representing Mr. Fayerweather—

22 Q. Claiming you mean, to represent him?

A. As representing him. I knew that Mr. Vaughan was Mr. Fayerweather's attorney—

23 Q. In fact?

A. Attorney in fact. I knew that because of the relation that existed between Mr. Vaughan and Mr. Fayerweather as attorney in fact and principal; it was very

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largely the result of matters concerning which we had acted as counsel for Mr. Fayerweather. At this interview which was had in my private office with Mr. Vaughan, Mr. Vaughan as representing Mr. Fayerweather had a consultation—

Mr. Bishop: Mr. Examiner, I object to the witness going on and making this statement.

The Examiner: You cannot object now. You must wait until the witness gets through with his answer and then put your objection afterwards.

Mr. Bishop: I think we are entitled to have specific questions and answers, so that objections may be
711 taken.

The Examiner: No, you cannot do that; you cannot interrupt in the middle of a witnesses' answer. Go on.

The Witness (continuing): As a result of that interview, I had one or two communications with Mr. Fayerweather before my personal interview with him at his house which I have before referred to.

24 Q. When you say "him," you mean Vaughan; the grammatical construction of your sentence makes it read as if you had one or two interviews with Mr. Fayerweather; you mean Mr. Vaughan.

A. Mr. Fayerweather.

25 Q. I thought you said you had seen him but
712 once.

A. Communications, I said, with Mr. Fayerweather before my personal interview with him. All of these communications and this interview were strictly and solely professional and were those of a client and counsel.

Mr. Bishop: I ask to have the answer stricken out upon the ground that it is immaterial and irrelevant to any issue raised by the pleadings.

26 Q. When you speak of communications with Mr. Fayerweather prior to the execution of this paper you mean nothing more than that Mr. Vaughan acted as intermediary in taking to Mr. Fayerweather advice given

by you and bringing back some response thereto from Mr. Fayerweather; is that not correct.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence, competent or material to the issues raised by the plea and replication.

A. The methods of my communication with Mr. Fayerweather I decline to answer on the ground of professional privilege.

27 Q. Do you know that you were communicating with Mr. Fayerweather except that Mr. Vaughan told you so?

Mr. Bishop: Objected to as incompetent, irrele-
713 vant and immaterial and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I decline to answer on the same ground.

28 Q. Do not think that that refusal makes you too much the judge of the facts upon which the professional privilege must rest?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication, and on the further ground that it calls for a conclusion or opinion of the witness and not for any facts.

A. My knowledge of the subject was acquired as
714 part of my professional employment, and therefore I cannot state it.

29 Q. Can you state any fact, as distinguished from your opinion of the legal effect of acts, which in your mind has a tendency to show that the professional relation and result of the privilege existed between you and Mr. Fayerweather prior to the date of the execution of that paper at his house, except the statements which you have already made this morning?

Mr. Bishop: Objected to as incompetent, irrelevant and immaterial, and for the reason that it calls for no

evidence competent or material to the issues raised by the plea and replication.

A. That comes pretty close to the wind, but I will state it. Mr. Fayerweather's own statements to me on the occasion of my interview at his house.

30 Q. And is that all?

A. His own statements to me relative to these previous communications, showing that whatever they had been they had emanated directly from him.

31 Q. And is that the only fact responsive to the question which you can state?

Mr. Bishop: I object to the question as incompe-
715 tent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. That is enough, I think.

32 Q. If there are some more facts it is not enough?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. That is your statement.

33 Q. The question is repeated. Is that the only fact responsive to the question which you can state?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it
716 calls for no evidence competent or material to the issues raised by the plea and replication.

A. No, that is not all; the fact is, as I have before stated, that Mr. Fayerweather was a client of my office at the time.

34 Q. And is that all?

A. I do not know of anything else.

35 Q. Now, will you please state what communications Mr. Fayerweather made to you, which in your mind established, as you say, the fact that the previous communications through Mr. Vaughan has been authorized by him?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I cannot state any communications made to me by Mr. Fayerweather on the ground of professional privilege.

36 Q. Do you consider the fact that Mr. Fayerweather had previously employed your firm, or the other members of it, or some of them, to attend to other matters for him, had any effect to create a professional privilege, as to the paper executed at his house and prior to his adoption of the acts of Mr. Vaughan or to cover
717 any of those prior acts from disclosure?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication; and, furthermore, that the question calls for a conclusion, merely, and not for any fact for a mental operation.

A. I consider that the relation of attorney and client existed between my office and all the members of it and Mr. Fayerweather at the time.

37 Q. So far as you know, had there been any prior business relation with Mr. Fayerweather, except that your firm prepared the power of attorney which
718 made Mr. Vaughan the attorney in fact of Mr. Fayerweather?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I have not stated that my firm prepared the power of attorney.

38 Q. I say that you have previously stated that he was the attorney in fact of Mr. Fayerweather, and you knew it. So far as you know, had there been any prior business relations with Mr. Fayerweather, except that

your firm prepared the power of attorney which made Mr. Vaughan the attorney in fact of Mr. Fayerweather?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I have not said that my firm prepared the power of attorney referred to. I have said that my firm were counsel for Mr. Fayerweather in matters resulting in the execution of that power of attorney, which I remember was prepared, and according to my recollection, the matters concerning which we were counsel for Mr. Fayerweather were of very wide interest and ran over
719 some years and were still to a certain degree pending at the time you mention.

39 Q. Excepting the power of attorney, the relation of your firm to Mr. Fayerweather was entirely in relation to the business of the firm of Fayerweather & Ladew, was it not, and not to Mr. Fayerweather personally?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. My recollection is that the matters concerning which we had advised and were advised with Mr. Fayerweather related to his business and consequently to a large extent to his firm affairs; but my recollection is that
720 we were counsel for Mr. Fayearweather personally and not employed by the firm.

40 Q. Are you confident that you are right in that statement?

A. I am not.

41 Q. Do you not recall that the capacity of attorney in fact which Mr. Vaughan bore to Mr. Fayerweather was limited to Mr. Vaughan's acting for Mr. Fayerweather in relation to the affairs of the firm of Fayerweather & Ladew?

Mr. Bishop: I object to the qnestion as incompetent, irrevalent and immaterial, and for the reason that it calls

for no evidence competent or material to the issues raised by the plea and replication.

A. I think that is so. This was a business firm and my recollection is we represented Mr. Fayerweather in certain directions in the firm of Fayerweather & Ladew; we did not represent the firm; it was Mr. Fayerweather's personal interest in the matter which we were representing; that is my recolleciion.

42 Q And you had no reason which you can state to believe, when Mr. Vaughan came to you on or about the 10th of November, that he was authorized by Mr. Fayerweather to enter into any matters concerning Mr. Fayerweather's testamentary papers except an inference that might be likely because you knew that he had a
721 power of attorney or was attorney in fact limited to the affairs of Fayerweather & Ladew and the interests of Mr. Fayerwerther in that firm; is that correct?

Mr. Bishop: I object to the question as incompetent, irrelevant and immeterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. No, I have not stated, Mr. Sherman, that there was anything in the interview with relation to testamentary papers; I have not stated that, I have tried not to state anything whatsoever about the meeting.

43 Q. I put this in the negative way. If you hear it read a little more carefully, I think you will say it
722 is not open to your criticism. Won't you hear it read again?

(Question repeated).

A. I have not stated that Mr. Vaughan interviewed me in any respect with relation to Mr. Fayerweather's testamentary papers.

44 Q. I have not said so; I have not implied so.

A. Yes, you have.

45 Q. I think not; but, of course, you must judge for yourself. I say, you had no reason to think that he was authorized to enter into any such matter, I do not say you or he entered into it. I understand very well that

I am not going to get you to break the privilege until the Court holds that there is no privilege; at the same time, I am going to try and get the facts so far as they do not come within the privilege?

A. I have answered the question. I have not stated that there was any interview about testamentary papers and I cannot answer the question.

46 Q. Was there any fact known to you prior to the question of that paper which did not rest upon the word of Mr. Vaughan which established at that time the authority of Mr. Vaughan to act for Mr. Fayerweather in relation to your professional advice which in your mind supports the claim that at that time you were
723 justified in regarding Mr. Vaughan as the mouthpiece of Mr. Fayerweather, and thereby attaching to the communication of Mr. Vaughan the privilege of Mr. Fayerweather?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised in the plea and replication.

A. Yes.

47 Q. But none other except those you have stated?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it
724 calls for no evidence competent or material to the issues raised in the plea and replication.

A. Yes, I have not stated, heretofore, all of the proofs and indications to my mind existing at the time of my first interview with Mr. Vaughan showing the authority of Mr. Vaughan at that time to speak for Mr. Fayerweather. It was beyond what I have already stated—

48 Q. I asked you, were they those which you had previously stated, and you said no. Now, let me ask you to please state those other facts.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls

for no evidence competent or material to the issues raised in the plea and replication.

A. My recollection is he assigned a paper.

49 Q. Who do you mean signed a paper?

A. Assigned a paper.

50 Q. By Mr. Fayerweather ?

A. By Mr. Fayerweather; that is my recollection.

51 Q. Anything else ?

A. Nothing else.

52 Q. Then you regarded Mr. Vaughan as the mouthpiece of Mr. Fayerweather in all matters which led up to the execution of the paper spoken of by you ?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the
725 issues raised by the plea and replication.

A. I have not so stated, and I do not now so state.

53 Q. Did you regard Mr. Vaughan as the agent or representative of Mr. Fayerweather in all matters communicated by him to you, if any, which led up to the execution of the paper at Mr. Fayerweather's house?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication; and upon the further
726 ground that it calls merely for a conclusion, and not for any fact.

A. The only interviews I had with Mr. Vaughan prior to the time of the execution of the paper at Mr. Fayerweather's house that I have above referred to, I should say immediately prior to the time, I do not know the exact time, a week or so, were professional interviews with him where I stood in the relation of counsel to him himself, or where he communicated something to me directly from Mr. Fayerweather himself as Mr. Fayerweather's mouthpiece. I had no other interviews with Mr. Vaughan at that time.

54 Q. Well, is your objection based upon the claim that there exists a professional relation both between Mr. Fayerweather and Mr. Vaughan and yourself, which prevents your disclosing the matters inquired of, and that that privilege extends not only to matters the result of the professional relation, but also extends to prevent your stating the facts from which the privilege flows—in other words, do you claim to be the judge, not only of the application of the privilege, but of the facts upon which its existence must rest?

A. No, I won't pass upon that as a question of law, I may have that right.

55 Q. Is that your position upon this record?

727 A. No, that is not my position. I am perfectly willing to state any of the facts which go to show this relation. I have tried to state them all; I think you can count them on two fingers of one-hand, but I stated them, I think, pretty fully in this examination.

56 Q. Perhaps my failure to get them is due to not asking the proper questions. I wish to learn how far you consider the relation of laymen to the other members of your firm extends to close your lips upon matters known to you.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication; and, also, as to form,

728 it is improper in form.

A. Absolutely.

57 Q. Is it not true that Mr. Vaughan, and not Mr. Fayerweather paid for the drawing of the power of attorney, which constituted Mr. Vaughan the attorney in fact of Mr. Fayerweather?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I cannot tell you that.

58 Q. Do you mean you won't, or you do not know?

A. I do not know anything about it; if I did, I should not answer.

59 Q. Now, Mr. Butler, your firm has been paid by the executors, or those who claim to be the executors of Mr. Fayerweather's will, a fee of about $5,000 to resist the disclosure of the contents of the paper which was executed at Mr. Fayerweather's house on or about the 11th of November, 1890; is that not so?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication, and upon the further ground that it assumes facts which are not in evidence.

729 A. No.

60 Q. Are you aware that that sum was paid your firm, and allowed in the accounts of the executors or alleged executors, and that the explanation of it given by Mr. Ritch was that it was in part, at least, payment for Mr. Choate's services in resisting, or preparing to resist the disclosure of the contents of that paper.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

730 A. No.

61 Q. Do you mean to say that if any such thing was done, you are not aware of it, or do you deny the fact that it was done? Was your firm paid $5,000 by the alleged executors of Daniel B. Fayerweather?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I cannot state without examining our books.

Mr. Sherman: Council for the complainants in this connection disclaims any inference or contention or belief that the circumstance referred to in the question could

or would have any influence whatever upon Mr. Butler's testimony, and protests that the inquiry is not made with any such intimation or view.

62 Q. Are you willing to state, Mr. Butler, whether there remains in your possession or under your control, any copy, draft, memorandum, notes, minutes, or other writings which contain the substance or the exact contents in whole or in part, of the paper which was executed at Mr. Fayerweather's house on the 11th day of November, 1890?

A. There is not.

63 Q. There is no such paper?

731 A. Not so far as I know.

64 Q. You testified before the Surrogate of New York County that the paper thus executed was a copy of a draft prepared by you. Would you like to see that testimony.

A. No, I remember that.

65 Q. What became of the draft prepared by you?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

732

A. I think, Mr. Sherman, that I went a little further in my testimony before the Surrogate than my professional privilege permitted me; but as I have already stated there, the paper was prepared by me, the draft was prepared by me, so I also will state, as I there stated, that in accordance with my best recollection I made most diligent search for such a draft, or anything in the nature of a draft, or memorandum or a copy, and could not find it. Of course I have not looked at this time, but I can say that from that time to this I have never seen anything in the nature of a copy or draft. I will also state for the benefit of you and the Court, that wherever

the draft went to, so far as my office or I personally am concerned, it was never intentionally destroyed, simply I did not suppose it was of any importance—or whether it was of importance or no, when I was asked to look for any such paper I was not able to find it, that is all.

66 Q. Was the copy made in your office, the copy of the draft which was executed?

A. Yes.

67 Q. Made in your office?

A. Yes.

68 Q. Was it made upon the typewriting machine?

A. No.

733 69 Q. It was engrossed by the engrossers in your office, or one of them?

A. Yes.

70 Q. What was the name of the man who engrossed it?

A. Joseph Immermann—he don't know anything about it.

71 Q. Is he still in your office?

A. Yes.

72 Q. When and where did you last see the draft which you tried to find in your office?

A. I do not remember.

73 Q. Well, was it in your office since you tried to find it there?

734 A. What?

74 Q. Is it you best recollection that it was last seen by you in your office since you tried to find it there, as you stated?

A. No, I stated before the Surrogate, and that was a good many years ago, and my recollection in these matters was better than it is now, my recollection was that I left the draft with the original.

75 Q. Left it with the original?

A. Yes.

76. Q. At Mr. Fayerweather's house?

A. Yes. I so stated, I have absolutely no recollection on the subject to-day.

77 Q. This writing signed by Mr. Fayerweather, which conveyed to your mind the authority to Mr. Vaughan, what has become of that?

A. Well, it is, I believe, in the printed papers here, some of those writings.

78 Q. Where is the original, so for as you know?

A. The printed papers in the Surrogate's proceeding.

79 Q. The printed papers cannot be the original?

A. I say that is what I refer to, I do not know; I am not the attorney in these proceedings; you can find out from any of the attorneys.

735 80 Q. I would have taken that course, but they will not admit the authenticity of any of the papers, so we have to get at it by technical means. Where did you last see the original of that writing?

A. At that time in my office is my recollection; I never saw it afterwards.

81 Q. Was it a somewhat extended paper, or a short one?

A. Well, I think I must decline to answer that on the ground of professional privilege to whether it was long or short, or what. I have already stated that my recollection was it was signed by Mr. Fayerweather. You will want to know its contents next.

82 Q. I want to know what I may know about
736 it. Are you willing to state whether it was on a single sheet or——

A. I do not think I am at liberty to say anything more about it further than this, that the existence of that paper, whatever it is, is referred to in the records of the Surrogate's proceedings.

83 Q. (Handing book) Will you look at the book which I now hand you, and state whether that is the record of the Surrogate's proceedings?

A. I could not tell you. I only appeared as a witness there, and I do not know; I cannot tell you.

84 Q. When you tell us that it appeared in that record, we assume that you know what that record is?

A. No, I do not know.

85 Q. Well, you cannot say?

A. No, I would have to know the whole record for that purpose.

86 Q. Was there more than one paper which you had from Mr. Fayerweather before the execution of that paper on Nov. 11th, 1890?

A. I cannot say positively, but I think so.

87 Q. And was the paper which you do remember, signed by Mr. Fayerweather, brought to you with the first interview of Mr. Vaughan?

737

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. That is my recollection.

88 Q. Well, do you know where that paper is, the original of it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issue raised by the plea and replication.

A. I suppose it is in the Surrogate's Court.

89 Q. You have parted with all control over it?

A. I never had any control over it.

738

90 Q. Was it not left with you?

A. No.

91 Q. Simply exhibited to you, and taken away by Mr. Vaughan?

A. Well, I do not say that.

92 Q. Well, do you say that?

A. Yes, I will say that.

93 Q. How did you know that it was authentic; did you know that it was in Mr. Fayerweather's handwriting and not in Mr. Vaughan's?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. No.

94 Q. You mean you did not know?

A. No, I did not know.

95 Q. And you do not now know that this supposed authority from Mr. Fayerweather upon which you base your confidence that Mr. Vaughan was representing him, was not in fact in Mr. Vanghan's handwriting instead of being in Mr. Fayerweather's and signed by Mr. Vaughan, and not by Mr. Fayerweather?

739

A. Oh, yes, I know that it was authentic.

96 Q. It was all in Mr. Fayerweather's handwriting?

A. Oh, no, I wont say that.

97 Q. Well, what part of it was in his hand writing?

A. I said a paper signed by him; I did not say any of it was in his handwriting except his signature.

98 Q. Well, do you mean now that the body of it was in Mr. Vaughan's handwriting and the signature in Mr. Fayerweather's?

A. No.

99 Q. You do not mean that?

A. No.

740

100 Q. Do you mean that you knew that the signature was Mr. Fayeweather's?

A. That I did know it?

101 Q. Yes?

A. No, I told you that I did not know at that time, if you mean by absolute knowledge, I did not know anything about it. When a man comes to me and shows me a paper and I have known him a great many years, I assume that he is not committing a forgery, ordinarily; but when you ask me what I did know about it at that time, I did not know anything about it, excepting that here

was something which gave me an impression of authority upon the part of the person speaking to me; but you ask me now whether this paper which I assumed gave authority, was in fact signed by Mr. Fayerweather, and I say now, "I know it." You ask me how I know it, and I tell you that I know that the whole thing is on the record, but I did not put it on the record. If you will read the record you will find it so.

102 Q. Then the paper you are speaking about, and which constitutes the only written authority upon which you acted in recognizing Mr. Vaughan as Mr. Fayerweather's messenger——

A. Didn't I say papers, paper or papers.

741

103 Q. You said that was the only one you could remember, of course that does not prevent your memory being refreshed. I only said so because you said so.

A. My recollection is that there were more than one paper; it may have been that there was only one.

104 Q. But the only paper which you can now recollect, which you consider as making a claim to represent him authentic, was this paper which has been, as you say, fully disclosed and put on the record in the Surrogate's Court?

A. Yes.

742

105 Q. Well, is there any reason arising out of the privilege at this time, which will prevent your now disclosing at this time what that was, according to the best of your recollection?

A. Yes. It would not do any human being any harm, as I can see, but if a client brings to you and exhibits to you certain papers, the question is, have you a right to say what they are.

106 Q. No, but if you disclose it once——

A. I never have disclosed it.

107 Q. How did it become part of the record of the Surrogate's Court, as you understand it?

A. I had nothing to do with it.

108 Q. Did you not authenticate it before it was put in evidence?

A. No.

109 Q. Was it not authenticated by Mr. Vaughan's testimony?

A. It is not anything that I have stated that I had anything to do with.

110 Q. Will you look at what purports to be the printed record in the Surrogate's Court, and which you say contains this paper, and point out the paper to which you refer?

743

A. I should be very glad to, but I shall have to decline that, on the ground of professional privilege.

111 Q. Then the privilege in that particular instance puts us to the trouble of finding in this printed record to which you refer us, what the paper is; is that so.

Mr. Bishop: I object to the question as incompetent, irrevelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

744

A. There is nothing in the paper itself which will indicate to you what it was, so how are you going to tell?

112 Q. So that when you refer us to the Surrogate's record for the paper, you do not mean to convey to us any information as to what it was, is that your position?

A. I try not to.

113 Q. You referred us to the Surrogate's record in an effort not to disclose anything to us, did you not?

A. Well assuming that I had a right to go as far as that, and say that there was no secret about the paper, it was in the Surrogate's Court if you want to look for it.

I say the existence of that paper at that time satisfied me of the truth of the representations of Mr. Vaughan at that interview, that he represented Mr. Fayerweather.

114 Q. In answering a question awhile ago, which in effect, stated that there was no necessity for inquiry about the original because the paper was contained in in the Surrogate's record——

A. No, no, no, no.

115 Q. You did not intend to give any information did you, in reference to that paper?

745

Mr. Bishop: I object to the question as imcompetent, irrevelant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Your question was directed to getting this paper, if you could find it. Was not that your question? Then you asked me subsequently if it was left with me, and I said I had nothing to do with it; that the paper was in the Surrogate's Court, or that the paper was in the record; that I had nothing to do with it; is not that it?

116 Q. If you are satisfied with that answer, I must be?

746

A. That is not any answer, I was merely asking a qnestion. I did intend to give you all the information possible in relation to the paper; and if I thought it was within my right as counsel, to describe that paper in particular to you, I would do so with the greatest of pleasure.

117 Q. You do not advance any objection to the disclosure of the contents of any of these papers, except the professional privilege, do you; you have no interest whatever arising from the payment, if there has been a payment, by the executors, of $5,000 to your firm, or from any other reason or motive, or interest in disclosing or experiencing any failure of memory in reference to these matters?

A. None whatsoever.

118 Q. The whole matter with you is that you consider that you are bound to stand on the professional privilege, is that so?

A. That is all.

119 Q. Were the interviews with Mr. Vaughan attended with enough indicia of the importance of the business, to impress itself on your memory?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

747

A. I cannot answer that.

120 Q. Do you mean that you do not remember, or that you won't answer?

A. I cannot answer it.

121 Q. Why can't you answer it?

A. Because I either remember a thing or I do not; and I do remember a large part of this transaction very distinctly, and other parts very indistinctly; for instance, you say that this transaction took place in the year 1890; now, I was very strongly of the impression that at the time of this transaction I was living in a certain house in New York which I moved away from in 1887, and you see I confused one house with another; and it must be, of course, that it took place in 1890, but yet I thought I was living, at the time, in a certain house in New York.

748

122 Q. That is a more or less arbitrary thing, the precise year, but the details, do you remember them?

A. Yes, I do.

123 Q. You think your memory has not suffered any lapse in regard to these matters?

A. Oh, it has, of course.

124 Q. Well, I mean as to the main features of what you did, and the reason why you did them?

A. No, the main features have not suffered any.

125 Q. You knew, did you not, that the purpose of the execution of this paper was to remove and exclude Mr. Thomas G. Ritch from all authority over this estate, either as executor or as residuary legatee, and that that was the principal purpose and occasion for the execution of that paper?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial; and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I must decline to state, on the ground of pro-
749 fessional privilege, anything of what I knew or did not know about this paper.

126 Q. Is it not true, Mr. Butler, that as representing Mr. Fayerweather, or as claiming to represent Mr. Fayerweather, Mr. Vaughan came to you, on or about the 10th of November, and stated to you in substance that Mr. Fayerweather was in the condition when he might soon die; that he would leave a very large estate; that Mr. Thomas G. Ritch had been his attorney, and had drawn his will and several codicils thereto; and that he informed you at that time of the exact or substantial contents of the will and codicils which had been theretofore executed, and stated that Mr. Fayerweather had become persuaded that in an effort to carry out his desires
750 respecting his entire estate, and to avoid the embarrassments or questions under the Statute of 1860, he had been persuaded by Mr. Ritch to make these testamentary papers, whereby Mr. Ritch and Mr. Bulkley were made his residuary legatees in form as absolute beneficiaries, but upon the undertaking by Mr. Ritch to apply the property which in that way he would acquire the legal control of the title to, to the purposes embodied in the will as originally drawn, and the tenth clause thereof; and that he was further persuaded that Mr. Ritch had brought about that situation with the intention of personally profiting by it, and setting up the claim when the time came that he was residuary legatee with Mr. Bulk-

ley, without any secret trust or restriction whatever for his own benefit; and that under that conviction on Mr. Fayerweather's part, he has decided to change his testamentary papers, and that he desired your firm, or you, to advise what change ought to be made, and what change could be made so as to prevent any such misapplication of his residuary estate, and so as to effectuate, so far as possible, Mr. Fayerweather's desires, though contradictory to the statute; and did you not advise either Mr. Vaughan, as representing Mr. Fayerweather, or subsequently Mr. Fayerweather, that the statutes could not be evaded in that way, and that you would not advise
751 any testamentary paper to be executed for any such purpose; and that the only way and the best way to do, was for Mr. Fayerweather to make a clear and candid expression of his wishes in the paper, in the testamentary paper; and to make such dispositions to those who were entitled to contest an excessive legacy to colleges, and such institutions, as would satisfy them; and that that was as near as he could lawfully go, or you would professionally advise him to attempt to go in carrying out his desires in so far as they were in conflict with the statute—didn't that occur, or that in substance?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

752

A. On the ground of professional privilege, I must decline to answer what Mr. Vaughan did or did not say to me, and what I advised him, or did not advise him on that occasion.

127 Q. Well, shall I repeat the question, or will you make a full answer to it?

A. For Heaven's sake, don't; I decline to answer it.

128 Q. You decline to answer it upon the ground of professional privilege, I suppose, but that is not what you say?

A. I decline to answer what Mr. Vaughan said to me or did not say to me, and what I advised him, or what I did not advise him, and that is the whole of your question.

128 Q. Will you make any other answer to my last question, except the answer you have just made?

A. Yes.

130 Q. Will you proceed?

A. On the ground of professional privilege, I decline to answer the question at all.

131 Q. Did Mr. Vaughan communicate to you at that time that Mr. Fayerweather had lost all his confidence in Mr. Thomas G. Ritch, that he had determined never to see him again?

753

A. I decline to answer on the ground of professional privilege.

132 Q. I prefer to finish my question before you answer.

A. Strike out the answer then.

133 Q. And to place it beyond his power to control, or to exercise any discretion over Mr. Fayerweather's estate or any part of it; and that it was essential and desired by Mr. Fayerweather, that Mr. Thomas G. Ritch should be dropped from the executors; and that the title to the estate under his testamentary papers should be vested in some person or persons excluding Mr. Thomas G. Ritch?

754

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. On the ground of professional privilege, I decline to answer.

134 Q. Now, will you state as fully and in detail as you can now remember, the entire contents of the paper

which you say was executed by Mr. Fayerweather at his house, on or about the 11th of November, 1890?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. The paper that was so executed was prepared by me in my capacity as attorney for Mr. Fayweather, and I decline, on the ground of professional privilege, to disclose its contents, or any part thereof.

135 Q. Mr. Butler, aside from the question of professional privilege, do you think you can state the substance, or the contents in whole or in part of that paper from your memory?

755

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. As to whether I could or not?

136 Q. As to whether you can, aside from the question of professional privilege?

A. Yes.

137 Q. Is it not true, Mr. Butler, that that paper executed on or about the 11th day of November, omitted and excluded as an executor of the last will of Daniel B. Fayerweather, Mr. Thomas G. Ritch?

756

A. On the ground of professional privilege, I decline to state anything as to the contents of that paper.

138 Q. Who were the persons named as executors of the last will and testament of Daniel B. Fayerweather in the paper executed, as you have stated by him, on or about the 11th of November, 1890, at his house?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Upon the ground of professional privilege, I decline to answer anything as to the contents of that paper.

139 Q. At the time of the execution of that paper by Mr. Fayerweather, did he appear to you to be of sound and disposing mind, and capable of making a will?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence, competent or material to the issues raised by the plea and replication.

A. Am I permitted to answer that, Mr. Sherman?

757

140 Q. You called in a lot of witnesses to certify to that; do you think that was under the privilege of counsel?

A. I was not a witness.

141 Q. But you called them in to testify?

A. Am I not stating something as to my transactions with my clients in saying whether or no he was of sound mind at that time? What right have you to ask me ,as a lawyer, anything at all abont my transactions with my client? If a lawyer is called to testify as to every transaction with his client, he will have no time to do anything else except to sit in a witness chair.

142 Q. Suppose some ill-disposed person destroyed a will; does your professional privilege extend to prohibit you from testifying anything concerning that will?

758

A. Well, I decline to answer the last question on the ground of professional privilege; I am not compelled to testify as whether Mr. Fayerweather was of sound mind or not.

143 Q. You procured the attesting witnesses to go through the statutory form, and to sign their names to that paper, did you not?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes.

144 Q. You said in the presence of Dr. Vedder and Dr. Wilcox and Miss Joyce, did you not, that it was desired by Mr. Fayerweather that they should hear that he signed sealed, published and declared that paper as and for a codicil to his last will and testament, in their presence, and that at his request and in his presence, and in the presence of each other, they were requested to subscribe their names as witnesses?

759

A. Yes.

145 Q. And Mr. Fayerweather heard you say that and assented to the request as being made for him?

A. I decline to answer that on the ground of professional privilege.

146 Q. Do you understand that the professional privilege extends to communications openly made to other persons for the purpose of having those other persons witness the matter?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

760

A. No.

147 Q. Well, why do you decline to answer the last preceding question?

A. The last preceding question had relation solely to Mr. Fayerweather, as to whether he heard or not.

148 Q. Did your firm represent any of the parties to the litigation in the State Court ensuing from the testamentary papers of Mr. Fayerweather? You represented Harvard, did you not?

A. Yes.

149 Q. Any others?

A. Subsequently to Mr. Fayerweather's death we represented Harvard College.

150 Q. And Vassar?

A. And Vassar, yes.

151 Q. Was the fact known to you at that time that the legal title, in the sense that executors have a legal title to the estate on controversy, was not in the defendants sued as executors, but was in other executors?

A. Are you referring now to the proceedings subsequent to Mr. Fayerweather's death?

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152 Q. Yes?

A. I had nothing to do with them.

153 Q. Did Mr. Choate have to do with that part of the case or that business?

A. I do not think so.

154 Q. Did Mr. Beaman?

A. Yes, I think Mr. Beaman did.

155 Q. Did you make known to Mr. Beaman the contents of this fourth codicil, or any of it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

762

156 Q. Or this paper executed November 11th, 1890, or any of it?

I have no recollection of doing so.

157 Q. Do you know whether Mr. Beaman knew in what he did in and after the litigation for Harvard and Vassar Colleges, that the legal title, so far as the legal title is in executors in such matters, was not by the papers executed November 11th, in Thomas G. Ritch, Justus L. Bulkley and Henry D. Vaughan as executors, but was in others, including one or more of them, but not all?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not know what he knew on the subject.

158 Q. He did not know that from you?

A. He did not.

159 Q. Do you remember at the time of the execution of that paper, Mr. Butler, that Dr. Vedder was present, this gentleman now preseut here (indicating)?

A. No

160 Q. And was one of the attesting witnesses?

763

A. No, I do not remember that gentleman. I cannot say that I remember the witnesses personally.

161 Q. Do you remember that Dr. Vedder was one of the attesting witnesses? Suppose you refresh your memory by looking at the codicil?

A. The testimony in the Surrogate's Court, which I happened to look at the other day, states that Miss Joyce, I think, and the two doctors were the witnesses; that is my recollection now, I do not remember the names of the doctors.

764

162 Q. Do you remember that after you had read the codicil—or with deference to your position I will still call it the paper—to Mr. Fayerweather, and the whole of it, and the legal verbiage of it, he said anything to Dr. Vedder or either of the witnesses about what he gathered as the purport of it, or from the thing as a whole?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. In my presence?

163 Q. Yes, in your presence too?

A. No, he made no such statement.

164 Q. Let me see if I cannot refresh your memory. Didn't he say, turning to Dr. Vedder, this gentleman, "As I understand it, after everybody and everything is satisfied, the remainder is to be divided up among the different institutions, each to receive their share," or that in substance?

Mr. Bishop: What page are you reading from?

Mr. Sherman: 698.

A. Whose testimony is that?

165 Q. That is Dr. Vedder's testimony.

A. I have no recollection of any such statement.

765

169 Q. Are you prepared to say that that did not occur?

A. My recollection is that it did not.

167 Q. Are you positive in your recollection that it did not? I show you the record.

A. I never heard of any such statement as that before; my recollection is that he did not make it.

168 Q. Are you positive in your recollection that he did not?

A. I cannot see how he could have made any such statement as that, and I do not recollect it, but it is a good many years ago. So far as my best recollection is concerned, I would contradict that statement. I do not see that it is of very much importance.

766

169 Q. Do you say that, because you recollect that the provisions in the paper then executed precluded any such understanding on Mr. Fayerweather's part?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I decline to state what the provisions of that paper were, directly or indirectly, on the ground of professional privilege.

170 Q. Didn't that paper, in substance, provide, among other things, that the tenth clause in the will was restored, so that it contained a mandate in the codicile that the devise to the colleges contained in the tenth clause of the will should be reinstated and restored, and stand on its merits against any attack that should be made upon it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. On the ground of professional privilege, I must decline to answer the question.

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171 Q. If you were credibly informed that that paper had subsequently been illegally destroyed, without the knowledge or authority of Mr. Fayerweather; and that it became necessary to reinstate it as his last will in order to defeat a crime; would yon then feel precluded by the considerations of professional privilege from disclosing its contents?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication; and, upon the further ground, that it is purely hypothetical and conjectural.

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Mr. Sherman: Yes, but I do not intend to move the Court without making it appear that it is necessary. I do not want to move against Mr. Butler unles it is absolutely necessary to protect my clients. I think I am authorized to make this inquiry.

A. So far as I know, yes.

172 Q. What do you understand to be the object of the professional privilege, to protect the interests of the client?

A. I must decline to answer that question, Mr. Sherman; I cannot go into that.

Mr. Bishop: This is not a law school.

The Witness: I must decline to answer the question as a hypothetical question and an argumentative question.

Mr. Sherman: I ask the examiner to certify to the Court the refusal of the witness to answer.

The examiner states that he will certify the record to the Court.

173 Q. Were you aware of the contents of the original will of Mr. Fayerweather when you made a draft of the paper executed on November 11th?

A. On the ground of professional privilege, I must decline to answer.

769

174 Q. Do you know whether Mr. Fayerweather, at the time of the execution of that paper, knew or recalled the provisions of the original will, to which it was a codicil.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. On the same grounds, I must decline to answer.

175 Q. Was any change made in that paper in the amount of the bequests to the different institutions mentioned in the ninth or tenth clause of the will?

770

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. On the ground of professional privilege, I must decline to answer.

176 Q. Was that paper the last paper which you prepared for Mr. Fayerweather to execute?

A. I had no further communications with Mr. Fayerweather after that interview, and prepared no papers.

177 Q. And prepared no other papers, you say?

A. Yes.

178 Q. Was any statement made by you to Mr. Fayerweather which will explain the preparation of a later testamentary paper by other attorneys, and its execution by Mr. Fayerweather four days after the one which was executed on the 11th of November?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. "Was any statement made by you to Mr. Fayerweather," you say?

771

179 Q. By Mr. Fayerweather to you?

A. On the ground of professional privilege, I must decline to answer.

180 Q. Did you know from Mr. Vaughan, or anyone else, that another testamentary paper superseding or purporting to supersede the one which you had drawn on the 11th of November, was drawn by other attorneys; and as is claimed, executed by Mr. Fayerweather on the day of his death?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea, and replication.

772

A. That appears on the record, I believe?

181 Q. It does not appear whether you were told about it by Mr. Vaughan?

A. I do not know when I learned it.

182 Q. Do you not know that you did not learn it until Mr. Fayerweather's death?

A. I have no recollection of knowing it until after his death.

183 Q. Did Mr. Vaughan ever make any explanation to you of how it was that after the preparation by you of this paper executed on November 11th, another paper

came to be executed on the 15th of November, on the day of Mr. Fayerweather's death, and which annulled or superseded the paper executed on the 11th; or how it was that he procured other attorneys to do it, and did not leave the matter until after you had taken it up, in your hands?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

773

A. After Mr. Fayerweather's death, Mr. Vaughan occupied the relation of client to our office; and we acted as counsel for him in his capacity as executor; and it is very possible that he may have made some statements regarding the matter, to me; I do not now recollect what they were, or when, but it is very probable that he did; if he had, however, I should be forbidden to testify to the nature of them exactly, on the ground of professional privilege; I have no definite recollection on the subject, however.

184 Q. When you accepted Mr. Vaughan as a client, as executor, did you know that his claim to act as such rested upon the probate of a paper purporting to be executed on or about the 15th of November, subsequent to your paper?

774

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I knew to the contrary.

185 Q. Upon what did his title to act as executor, as you then understood it, rest?

Mr. Bishop: I do not think that the witness understood you, Mr. Sherman.

Witness: Yes. I did.

Mr. Bishop.—I object to the question.

A. Mr. Fayerweather's testamentary papers executed prior to the date that you mention.

186 Q. And entirely irrespective of any paper executed November 15th?

A. Where is that paper of November 15th; you showed it to me a few moments ago. I do not know that I ever looked at it before.

187 Q. (Handing book.) Here it is?

A. I do not think that has anything to do with it, sir. There was a previous codicil appointing him executor.

775

188 Q. Which one?

A. I do not know; I have not read it. "Codicil January 7th, 1888. I hereby nominate my friend, Henry B. Vaughan of Elizabeth, New Jersey, as Executor." Now, you ask me what this title rested upon; it rested upon that codicil which, so far as I know, had never been revoked.

189 Q. When you say that so far as you know that codicil had never been revoked, do you mean to testify that the paper executed on the 11th of November did not so far revoke it as to leave Mr. Thomas G. Ritch out altogether as executor?

776

A. No, sir; Idid not mean to testify anything about the codicil of the 11th of November, as you are pleased to call it, because I have not testified to anything in regard to the contents of that paper, and do not intend to do so, on the ground of professional privilege.

190 Q. Then when you say that so far as you know the codicil of January 7th, 1888, has never been revoked, do you mean to qualify that in effect, by saying, save and except so far as the paper executed November 11th, 1890, may have revoked it, but whether it did or not you decline to state; is that what you mean?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication; and upon the further ground, that the testimony of the witness speaks for itself.

A. No.

191 Q. I am calling your attention to the fact; do you mean to accept that from the generality of your answer?

A. No, I do not. In a negative way you have doubtless disclosed the fact that so far as I knew the paper which you referred to did not affect Mr. Henry B. Vaughan's title as executor under the codicil of the
777 7th of January, 1888, because I stated that the fact of my knowledge of Mr. Vaughan's executorship did not come from this paper of November 15th, 1890, but from a previous paper.

192 Q. Well, in order to clear up any misunderstanding of the previous questions and answers, I ask you now whether the codicil of January 7th, 1888, was not revoked, in whole or in part, by the paper executed on November 11th, 1890?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

778

A. Upon the ground of professional privilege I decline to state the contents of that paper, or what was, or was not included in it.

193 Q. When you said above that, so far as you knew, the codicil of January 7th, 1888, which you referred to as making Mr. Vaughan an executor was not revoked, you knew it had never been revoked; you did not intend, did you, even by inference to state the contents or effect of the paper executed November 11th, 1890?

A. No.

Adjourned to 2 P. M.

After recess.

194 Q. When you entered the room where Mr. Fayerweather was, on the 11th of November, were you introduced to him?

Mr. Bishop: I object to the question as imcompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material upon the issues raised by the plea and replication.

A. Yes.

195 Q. Do you remember by whom?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

779

A. I do not remember.

196 Q. Was it by Henry B. Vaughan?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the the plea and replication.

A. I do not remember.

197 Q. Was Mr. Henry B. Vaughan present when you first saw Mr. Fayerweather on that occasion?

A. That I do not recollect.

198 Q. Did you go to the house with him, or alone?

A. Alone, is my recollection.

780

199 Q. Was he there when you arrived?

A. I do not recollect.

200 Q. Did you see him there at all while you were there?

A. I do not remember.

201 Q. I what part of the house was this paper executed.

A. The second story room.

202 Q. The front room or back room?

A. Front.

203 Q. Were you sitting at a table when it was done, in the front room?

A. My recollection is that Mr. Fayerweather was seated in a chair with the back of the chair towards the wall, and that there was a smaller table beside him, but I was not seated at the table.

204 Q. Let me see if I can refresh your recollection. Was there not a table there with a drawer in it that was pulled out to get some papers, during some part of the transaction?

A. I do not recollect any such thing; I think there was a small table beside Mr. Fayerweather.

781

205 Q. You say the back of his chair was towards the wall, do you mean the side wall of the house, or the front wall?

A. No, as I recollect the plan of the house, it was——

206 Q. North and south on the north side of 57th street?

A. The room in which I was was in a house on the north side of 57th street, the entrance I should say was on the east side of the house, and the room that I was in was quite a large room on the second story, fronting south on 57th street; and Mr. Fayerweather was seated near the back of the room, against the easterly wall of the room, with the back of his chair towards the easterly wall.

782

207 Q. Do you mean the east wall?

A. Yes. Suppose that was the south, he was over there where that bookcase is (indicating). The easterly wall of the room, near the back of the room, and there was a small table beside him.

208 Q. Well, was it a table five feet long by three and a half wide, or such a matter?

A. No, my recollection is, it was a small table.

209 Q. Well, where was the ink that was used in making the signature; was it on that table, the ink bottle.

A. I do not know.

210 Q. The pen was dipped in ink, was is not, before he signed his name?

A. I do not remember.

211 Q. Don't you remember whether he wrote it in ink ?

A. I was not a witness to the execution of the paper.

212 Q. You saw him sign it, didn't you?

A. I think I will have to decline to answer that on the ground of professional privilege.

213 Q. What, after you have said that the paper was executed there? You have said it was executed there?

783

A. No.

214 Q. At what point do you draw the line of professional privilege? When you have said that the paper was executed there, does the privilege extend to the question of whether the signature was written with pencil or ink?

A. Well, I have stated already that I do not recollect anything about it, Mr. Sherman, and I do not think it worth while to discuss that.

215 Q. I understand you to decline, on the ground of privilege?

784

A. Yes. I believe I have stated in the course of my examination that Mr. Fayerweather did execute a paper, in the presence of witnesses, on that day and on that occasion.

216 Q. That paper that you went through the statutory form of attestation?

A. And that I read a certain sentence to the witnesses at the time.

217 Q. If you do not feel bound by professional privilege after that, will you simply say what your recollection is about pencil or ink?

A. It was undoubtedly executed in ink and signed in ink, by Mr. Fayerweather.

218 Q. But do you not remember where the ink was obtained, or the pen?

A. I have no distinct recollection on the subject; I presume it was from an ink-bottle on the table.

219 Q. Who was present besides Mr. Fayerweather and yourself?

Mr. Bishop: That is objected to upon the ground that it is incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication; and upon the further ground, that the question has been already asked and answered.

785

A. At the time of the execution of the paper, the three witnesses, Miss Joyce, I think, was the lady's name, and two doctors.

220 Q. Was Mr. Fayerweather, as you then observed, quite hard of hearing?

Mr. Bishop: I objection to the question as incompeent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Not as I observed.

786

221 Q You were not aware of the necessity of speaking to him in a loud voice, in order to be clearly heard?

A. No.

222 Q. And you said what you uttered in his presence, without being aware of any such necessity?

A. Yes, sir.

223 Q. What fact can you state which shows that he heard whatever you said, whatever it was?

A. I must decline to answer on the ground of professional privilege.

224 Q. Did you speak in a tone of voice which would enable the other persons in the room to hear everything you said to him?

A. My impression is that I did not.

225 Q. Did you make any conscious effect to speak so that they would not hear?

A. I appreciated the fact at the time, that my interview with Mr. Fayerweather was a private one, and the other persons in the room had withdrawn, as far as possible, to the corner of the room by the window, in Fifty-seventh street; I think my back or my three-quarters back was towards them at the time of my talking with Mr. Fayerweather.

226 Q. You were not more than ten feet away from them, however, were you?

A. Oh, I should say yes, more than that.

227 Q. Do you know how large that room is, how long is it the longest way of it? What is your judgment about that?

787

A. You ask my recollection about it; of course, I have not measured the room.

228 Q. Of course, I mean your judgment?

A. I should say the room was fifteen by twenty-two.

229 Q. And you were about the middle of it, were you not, of the long way of it, when you were at that table or near that table?

A. No, I should say that I was nearer the door, that is, if the door——

230 Q. The north door?

A. The north door of the room.

788

231 Q. And they were at the south window, is that what you say?

A. They were at the south-westerly window.

232 Q. Well, was there not a space of ten feet or so

between you and the northerly wall of the room, as you then were?

A. Oh, no, I say—my recollection is that I was only a few feet from the wall.

233 Q. Well, how many—about how many?

A. Oh, about five.

234 Q. Were you as close to the wall as that?

A. That is my recollection.

235 Q. Then these people—

A. I may be all wrong, you know.

789

236 Q. Is it your impression that there was a distance of as much as fifteen feet between you and the other people in the room, other than Mr. Fayerweather?

A. Yes, fully that.

237 Q. Fully that?

A. Yes.

238 Q. Did these other people retire upon any intimation from you or Mr. Fayerweather that their presence there was not desired, or that the matter was private; or was its privacy merely remaining in your mind, or covering what you did?

A. My impression is, I understood—

790

239 Q. No, I did not ask you what you understood. What was said by either you or Mr. Fayerweather?

A. You are asking my impression?

240 Q. No, I ask you what was said by either you or Mr. Fayerweather to convey that impression to them?

A. I do not recollect what was said.

241 Q. Well do you recall that anything was said of that character?

A. I know that something was said to intimate to them the privacy of the interview.

242 Q. By whom, by you or by Mr. Fayerweather?

A. I think by me.

243 Q. Look at page 781?

A. My recollection is that one of these persons who afterwards acted as a witness, either Miss Joyce or one of the doctors, asked me if they should leave the room, and I said no; that is my recollection; and they withdrew, upon that, to the window.

244 Q. Did you ask them not to listen?

A. I did not.

245 Q. Were they within hearing distance?

A. I do not think so.

246 Q. Did you read the paper in such a voice that you were satisfied in your own mind that Mr. Fayerweather heard all you read?

791

A. Yes.

247 Q. Did Mr. Fayerweather make any statements that you can recollect, of what he understood to be the effect of the paper which you had read to him?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised upon the plea and replication.

A. I must decline to answer that on the ground of professional privilege.

248 Q. Did he make any statement to persons in the room, other than you, on that subject?

792

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised upon the plea and replication.

A. I have no recollection.

249 Q. Did he make any statement to you from which it was obvious to you that he was willing the others should hear, or that he intended the others should hear?

Mr. Bishop: . I object to the question as incompetent, irrelevant and and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I have no recollection of his doing so; my recollection is that he did not.

250 Q. Do you know what became of this paper after it was signed by the witnesses?

A. I do not.

251 Q. Was it left with Mr. Fayerweather when you came away?

A. I have no recollection on the subject.

252 Q. Your recollection about it ends with the signature of the witnesses, does it?

A. Yes.

793

253 Q. Did you ever see it again after that?

A. I never did.

254 Q. Did you read the subpœna which was served upon you in this proceeding?

A. Yes, I did.

255 Q. Have you in your possession, or under your control, any of the writings described in that subpœna?

A. Have you got a copy of the subpœna?

256 Q. (Handing paper). Yes, that is a duplicate original?

A. No.

794

Mr. Sherman: Mr. Butler, I have not concluded your examination, but necessarily we are at a standstill so far as your testimony is concerned, until the Court shall have ruled upon the propriety of your objections. Now, I want to make an application to the Court in the way which would be most respectful and convenient for you; and I suggest that if it would be agreeable to you we make some stipulation of record on that subject, instead of applying for an attachment, and all that.

The Witness: I do not know the practice; you had better go ahead in the regular way, whatever it is.

Mr. Sherman: If you will accept notice of the motion to compel you to answer for the next motion day, before whatever Judge sits, I will simply leave it in that way.

If you want me to make an affidavit and get an attachment, you understand that I do it with great regret that I have to take those formal and inconvenient and undesirable steps. Theoretically from our point of view, you are a contumacious witness. I desire to adjourn the further examination of this witness:

The Witness: I shall consider the subpœna holds, and I will come here whenever you get this question argued and are ready to proceed. You can adjourn it without fixing a day.

795

Counsel for complainants asks the Examiner to certify to the Court the record and the various refusals of the witness to answer the interrogatories.

The Examiner states that he will so certify.

796

UNITED STATES CIRCUIT COURT

SOUTHERN DISTRICT OF NEW YORK

FAYERWEATHER, *et al.*,

797 vs.

RITCH, *et al.*

Application to compel a witness to answer questions certified by the examiner, sitting to take testimony in equity. One of the issues upon which complainant is seeking to put in proof is as to the destruction of a document, executed by a deceased testator and known as "the fourth codicil," and complainant is seeking to show the contents of such codicil, which he contends was duly executed by testator in the presence of subscribing witnesses. The witness under examination is the coun-
798 sel of deceased who took his instructions for the preparation of the codicil, drew it up, delivered it to the testator, and apparently saw him execute it, Presumably he is able to testify what were the contents of the document (since destroyed) and so far as appears no other witness is able to do so. The witness declines to testify to the contents of the document, contending that his lips are sealed as to communications with his client both by well-recognized principles of jurisprudence, and by the statute of the State of New York.

LACOMBE, Circuit Judge:

It is a sound public policy which provides that an attorney or counsel should not be allowed to testify to any of the transactions or conversations between himself and

his client which led up to the preparation of any document. But when the document, be it a will or a contract or what not, has been executed, its contents are no long-confidential, the reason for the rule ceases, and the council may as properly testify to the contents as may any other witness who knows such contents.

The statute of the State of New York provides (Code of Civil Procedure, Sec. 835.) that: "An attorney or counsellor at law shall not be allowed to disclose a communication made by his client to him or his advice given thereon, in the course of his professional employment."

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At the time the cause hereinafter referred to was before the Courts the next section, 836, provided that "Sec. 836. The last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or the client." While the statute stood thus the case of *In re* Coleman came before the Court of Appeals, 111 N. Y.. 220. Counsel who had prepared the will of deceased under instructions from him and had subsequently at his request signed the attestation clause as witnesses were allowed to testify to the circumstances attending its execution, including the condition of his mental faculties at that time. This was upon the theory that the request to witness his will was a waiver of the privilege which the statute conferred. The language of the Court was broad enough to warrant the finding of a like waiver as to the mere contents of the document, in the execution of the instrument by deceased. "It would," says the Court, "be contrary to settled rules of law to ascribe to the testator an intention, while making his will and going through the forms required to make it a valid instrument, to leave in operation the provisions of a statute which he had power to waive, but which if not waived, might fustrate and defeat the whole object of his action." And certainly the whole object of a testator's action would be destroyed, if his executed will being by some accident destroyed, the only witness who could testify to

800

its contents was forbidden to testify thereto. Since the Coleman case the statute (Sec. 836.) has been amended so that it now reads: "Sec. 836. The last three sections apply to any examination of a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. * * * But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness, as to its preparation and execution in case such attorney is one of the subscribing wit-
801 nesses thereto." But even in their present form the two sections (835 and 836) taken together seem not to be applicable to the cause at bar, provided the testimony sought to be elicited from council is strictly confined to a statement of the contents of a document which ceased to be confidential when it was executed. The execution of the document, however does not make the transactions and conversations between council and client which led up to its execution any the less confidential, and as to such transactions and conversations there is no express or even any implied waiver. The privilege covers also all conversations and transactions with the client's agent or intermediary.

802

The witness, therefore, should answer, if he knows, as to whether or not a paper prepared by himself as council was in fact signed by deceased in the presence of attesting witnesses in the form and manner required to constitute a valid publication of such paper as a testamentary document; and, if he knows, or as far as he knows, he should state the contents of such published document, if he testify that the document was in fact thus published. The objections to all other questions inquiring as to conversations and transactions with his client or his client's agent leading up to the preparation and execution of such document are sustained. The case of Glover v. Patten, 165 U. S. 394, has not been overlooked, but it

does not seem to be controlling to a contrary decision.

October 22, 1898.

MAUS R. VEDDER, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct-examination by Mr. Sherman:

1 Q. Dr. Vedder, you have been a physician for how many years?

A. I graduated at the College of Physicians and Surgeons in 1861.

2 Q. And you have practiced in this city ever since?

803

A. No, sir, for about twenty years, the rest in Long Island.

3 Q. And you are now in active practice here?

A. I am.

4 Q. Where is your residence and office?

A. 708 Madison avenue, New York City.

5 Q. Did you know the late Daniel B. Fayerweather?

A. I did, sir.

6 Q. How long?

A. Well, for fifteen years, I think; that is my impression now.

7 Q. Were you his attending physician at the time of his death, and prior thereto?

804

A. I was.

8 Q. For how long prior?

A. Well, nearly that length of time.

9 Q. Were you intimately acquainted with him?

A. Yes, sir, I was his friend and his physician.

10 Q. Of what disease did Mr. Fayerweather die?

A. He died of consumption.

11 Q. And how long was he afflicted with that disease before his death?

Mr. Bishop: That question is objected to as incompetent, irrelevant and immaterial, and upon the ground that the evidence called for by this question and by other

questions, is not relevant under the plea and replication, neither competent nor relevant.

A. My impression is about five years.

12 Q. Did he cease to attend actively to business for some time before his death?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial, and upon the ground that the evidence called for is neither competent or relevant and under the plea and replication.

A. Not a great while, no, sir.

13 Q. How long?

805

A. I am under the impression it might be a year or two—eighteen months, or somewhere near there.

14 Q. Was he a member of some firm?

A. Yes, sir.

15 Q. What was the firm?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and upon the ground that the evidence called for is neither competent nor relevant under the plea and replication.

A. I believe it was Fayerweather & Ladew.

16 Q. Their business was what?

A. Leather.

806

17 Q. Were you present in his house on or about the 11th day of November, 1890, when a paper was signed by him in the presence of Mr. Prescott Hall Butler, yourself and others?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and upon the ground that the evidence called for is neither competent nor relevant under the plea and replication.

A. Yes, sir.

18 Q. Was that the date, November 11th?

A. November 11th, 1890.

19 Q. How long was that before his death?

A. I think he died on the 15th?

20 Q. Of November?

A. Yes, of the same month.

21 Q. At what time of the day was it that he signed this paper?

A. It was somewhere about noon.

22 Q. Were you in the house by appointment?

A. Yes, sir, the second visit; I was there twice, by appointment.

23 Q. On the occasion when he signed this paper you were there by appointment?

807

A. Yes, sir.

24 Q. To witness the paper?

A. Yes, sir.

25 Q. And who else was present at the time in the room?

A. Miss Elizabeth Joyce and Dr. Wilcox.

26 Q. Who was Miss Elizabeth Joyce. Mrs. Fayerweather's sister?

A. No, a relative; a niece I think it was.

27 Q. And how did you hear her spoken of, while you were there?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and upon the ground that the evidence called for is neither competent or relevant under the plea and replication.

808

28 Q. What was the mode of addressing her, "Lizzie?"

A. Who, the family?

29 Q. The niece.

A. The family spoke of her as "Lizzie?"

30 Q. Yes.

A. I do not recollect that.

31 Q. Were you present in the room when Mr. Butler arrived?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and upon the ground that the

evidence called for is neither competent or relevant under the plea and replication.

A. Mr. Butler was there, I think, first, I came in.

32 Q. Whom did you find there when you came in?

A. Mr. Butler and Mrs. Fayerweather and then this Miss Joyce. who is now Mrs. Reynolds; I do not recollect anyone else.

33 Q. Where was Mr. Fayerweather when he signed the paper?

Mr. Bishop: I object to the question as incompetent irrelevant and immaterial, and upon the ground that the evidence called for is neither competent nor relevant under the plea and replication.

809

A. Upon the second story front.

34 Q. In what part of the room?

A. Well, it was near the—as I recollect the position, it was near the center of the room, a little to the east.

35 Q. Of the middle line?

A. Yes.

36 Q. Was he sitting in a chair?

A. In a wheel chair, I think they brought him in on a wheel chair.

37 Q. Was there a table nearby?

A. Yes, sir; there was his library table.

38 Q. About five feet by three and a half, or such a matter?

810

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and upon the ground that the evidence called for is neither competent nor relevant under the plea and replication.

A. Yes, about that size.

39 Q. What was Mr. Butler doing when you arrived?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and upon the ground that the evidence called for is neither competent nor relevant under the plea and replication.

A. I do not recollect.

40 Q. Was he reading a paper to Mr. Fayerweather?

A. No, he had not begun the paper yet.

41 Q. When did you first see the paper? Who produced it, M. Butler?

A. I recollect Mr. Butler standing and Mr. Fayerweather sitting down and Mr. Butler reading the paper, and I asked Mr. —— knowing Mr. Fayerweather very well, I thought perhaps he did not care to have us listen to the paper and I then suggested to him if it was necessary for us, for Dr. Wilcox and myself—Miss Joyce
811 was not present—whether we should listen to the paper. Mr. Butler said it was not necessary, and I thought perhaps it would please Mr. Fayerweather, and I went to the window with Dr. Wilcox, the 57th street window, while the paper was was being read; I heard a portion of it, however.

Mr. Bishop: I move to strike out the answer of the witness upon the ground that the testimony is incompetent and immaterial under the issues raised by the pleadings in the case.

Mr. Sherman: Will you accept a stipulation that the answers may be taken subject to the same objection, or do you want to repeat it in each instance?

812

Mr. Bishop: I do not care to repeat it, but I want to have it in full upon the record.

It is stipulated that the stenographer, in writing out the minutes of the testimony of this witness, shall note an objection on the part of the defendant, the trustees of Hamilton College. to each and every question, upon the ground of the incompetency, irrelevancy and immateriality of the matter called for by the question, as not pertinent under the issues raised by the plea and replication.

42 Q. Did Mr. Fayerweather say or do anything to indicate that he was unwilling that you should hear what Mr. Butler was doing or saying or reading?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls

for no evidence competent or material to the issues raised by the plea and replication.

A. No, sir.

43 Q. How long a paper was this, was it one page or more?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Well, I think it might have been not less than three and probably four.

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44 Q. Legal cap pages?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir.

45 Q. Did Mr. Butler read it to Mr. Fayerweather in such at one of voice that you could by paying attention have heard it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

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A. I could have heard it; yes, sir.

46 Q. And when you paid attention did you hear it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I heard him read it, or read a portion of it and then I interrupted him and asked him whether it was necessary to listen.

47 Q. Do you remember what portion you heard him read? If you remember, state what it was.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. No, sir; I do not recollect.

48 Q. After the reading of it, did Mr. Fayerweather say anything in regard to his understanding of it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

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A. Yes, sir.

49 Q. What did Mr. Fayerweather say?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. After Mr. Butler had completed the reading of the paper, I came from the window and walked in his direction and he looked towards me and said "Now, as I understand it, after everybody is paid," and then Mr. Butler—

50 Q. He looked at first one and then the other?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that
816 it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir. "After everybody is paid, and everybody is satisfied, the remaining portion is to be divided up among the different colleges, each to receive their share."

51 Q. A did Mr. Butler assent to that?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, that was as I understood the short part codicil or of a paper.

Mr. Bishop: I ask to have so much of the witness' answer stricken out as gives his understanding.

Mr. Sherman: I consent that it be stricken out, what he understood.

52. Q. Was Mr. Fayerweather on that occasion in your opinion of sound and disposing mind?

Mr. Bishop: I object to the question on the ground that it is incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication, and upon the further ground that it calls for an opinion of the witness and not for facts and circumstances.

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A. I think he was competent.

53 Q. Was he rational or irrational?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Rational.

54 Q. Did he appear to understand the purport and substance and meaning of this paper, and what he was doing about it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

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A. He appeared to.

55 Q. And was his physical condition at that time such that in your opinion as a physician his mind was competent to act understandingly and to give full force to his desires?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. His physical and mental condition?

56 Q. Yes.

Mr. Bishop: Furthermore, I object to the question as to its form.

A. Yes.

57 Q. Did Mr. Butler say anything to you and to the others about becoming witnesses?

Mr. Bishop: I object to the question as incompetent, irrevelant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. No, sir.

58 Q. Well, did he give any expression of Mr. Fayerweather's wish that you should sign as witnesses?

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Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Mr. Fayerweather requested us to sign as witnesses.

59 Q. And you did so?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

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A. I did.

60 Q. And what became of that paper?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not know.

61 Q. When did you last see it.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. At that time, on the 11th.

62 Q. When you went away did you leave Mr. Butler there, or did he go before you went?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I think Mr. Butler went first.

63 Q. And left the paper behind him?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not know.

821

64 Q. Was the paper signed by each of the witnesses in Mr. Fayerweather's presence and in the presence of each of the others?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes sir.

65 Q. About what time on the 15th of November did Mr. Fayerweather die, in the evening? About what hour did he die?

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Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. In the neighborhood of nine or ten o'clock in the evening.

66 Q. Were you present when he died?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I was by his bedside.

67 Q. Down to what period prior to his death was he able to understand what was said to him and make intelligible answers to it?

Mr. Bishop: I object to it as not calling for facts and circumstances, but calling for the opinion of the witness on facts and circumstances which have not been testified to.

A. I saw him in the morning of the 15th after my office hours, as I recollect.

68 Q. That would be about when?

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Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Eleven o'clock. I do not think he was competent at that time.

69 Q. Well, was he able to understand what was said to him and make intelligible answers to it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir; he could answer.

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70 Q. Well, down to what time was he able to understand what was said to him and make intelligible answers, so far as you know?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication, and upon the further ground that it does not appear that the witness was there.

Mr. Sherman: Well, he can speak only of the time that he was there.

A. Well, I do not know.

71 Q. How long did you remain there on this occasion when you arrived at eleven o'clock in the morning of the 15th of November?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I made my usual call in the morning, the usual professional call in the morning and then I think I was in the house—

825

72 Q. Well, it would be better to state about how long you remember that as being and we can get at it better.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I might have remained an hour.

73 Q. You think you were there until twelve o'clock on the 15th?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

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A. The time that we signed the paper, I think I was there about an hour.

74 Q. No, that is the 11th; I am talking now about the day of his death. You say you got there at eleven, and now I ask you how long you remained.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Just the usual call, probably twenty minutes.

75 Q. And when did you go again, that day?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls

for no evidence competent or material to the issues raised in the plea and replication.

A. On the appointment at twelve o'clock, or about that time.

76 Q. And how long were you there on that occasion?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Well, probably an hour.

77 Q. And when did you go again? I think you are confusing the 11th with the 15th.

827

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. That is true, I am.

78 Q. Will you kindly confine your attention now to the day of his death, the 15th of November, Saturday. Now please state when you first arrived there on the morning of the day of his death and how long you stayed?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

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A. Yes, now I understand; that ought to be stricken out, for the reason that I had the two confused. Well, I was there—I went immediately after my office hour, in the neighborhood of eleven o'clock, and I might have remained there half or three-quarters of an hour.

79 Q. And then when did you go again on that day?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not think I came again until in the evening, about ten o'clock. I came then, but I did not come by appointment. I had been asleep and woke up and concluded I would like to see him once more, and I went back and stayed then, until the time of his death, which was about ten or eleven o'clock, or somewhere about there.

Q 80. Had an appointment been made with you to go there on that afternoon which was recalled or which you did not keep?

Mr. Bishop: Objected to on the ground that it is leading.

829

A. I do not recollect.

81 Q. Had anything been arranged with reference to your being a witness for some other paper that day?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir.

82 Q. Well, what arrangement was that, and who made it?

830

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that the question calls for no evidence competent or material to the issues raised by the plea and replication.

A. I think Mr. Vaughan and Mr. Fayerweather, no, Mr. Fayerweather arranged it, that I should come in the neighborhood of five o'clock to witness another paper.

83 Q. And were you to bring anyone with you as a witness?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, Dr. Wilcox.

84 Q. And before that time arrived, did you receive any message on the subject of your coming?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir; that it was not necessary.

85 Q. Who brought the messsage?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

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A. I do not know. I got the message from my servant.

86 Q. It was left at your door by somebody whom you did not see, is that what you mean?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I was not in when the message came; it may have been from Dr. Wilcox; I am not sure about that; but I did not get it directly from the messenger.

832

87 Q. Was Mr. Vaughan in the house on the 11th at the time of the execution of the paper which you witnessed?

A. No, sir, I do not think he was there.

88 Q. Was he there at any time on the 15th, the dying day?

Mr. Bishop: I object to the question as incompetent, irrelevant snd immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir.

89 Q. When did you first see him there on that day?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised the plea and replication.

A. At the time I made him the visit in the morning.

90 Q. Did you have any conversation with him at that time, and if so what passed between you?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

833

A. I came into the room, and when I came in, I found Miss Joyce and Vaughan there.

91 Q. You mean the Miss Joyce that is now Mrs. Reynolds?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir.

92 Q. Now, will you state what was said by you to Mr. Vaughan or by Mr. Vaughan to you at that time, and all of it?

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Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I inquired of Miss Joyce Mr. Fayerweather's condition, and asked the usual questions of how he passed the night and so on, and I afterwards went into the room to examine Mr. Fayerweather, and after doing so I returned to the front room and found Miss Joyce and Mr. Vaughan there.

93 Q. Miss Anner Amelia Joyce, is that right?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes.

94 Q. There was another Miss Joyce there on the 11th, and you do not want to get them confused.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. No. I reported his condition.

835

95 Q. Now, what did you say about his condition to Mr. Vaughan, as near as you can remember?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reasok that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I told Mr. Vaughan words to this effect, that Mr. Fayerweather was in a critical condition, and that there was nothing more to be done for him, that he was failing very fast and probably would not live for any great length of time, and I said, furthermore, that I hoped everything was finished, that there were not any other papers to sign; and Mr. Vaughan then replied, or Miss Joyce, that there was one more very important paper; and I replied that I thought it was a shame to disturb a dying man; and Mr. Vaughan asked me how long I thought—if he would live until Monday—this
836 was Saturday—I told him I thought not, that he would probably die that day. He then became very much excited over it, and said that he must go at once in order to get a paper ready; I supposed it was some partnership paper, maybe that supposition is not necessary, and I thought that the will and all that matter had been settled, or I should have objected more seriously to his drawing a paper of that kind.

Mr. Bishop: I ask to have stricken out that portion in which he testifies to his suppositions and what he would have done.

96 Q. And did Mr. Vaughan then go away?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Immediately in haste.

837

97 Q. In your opinion, Doctor, was Mr. Fayerweather in a condition of mind on the 15th day of November, 1890, at the time you informed Mr. Vaughan of his condition and down to the time of his death, to be competent to make a will?

Mr. Bishop: Objected to upon the ground, in the first place, that it does not appear that the witness saw Mr. Fayerweather at that occasion which is referred to; further, upon the ground that the question calls for his opinion, the conclusion of the witness without a detail of the facts and circumstances upon which the opinion is based, and upon the general ground that the evidence is incompetent, irrelevant and immaterial, and upon the further ground that the opinion of the witness is not competent upon the evidence already disclosed, and upon the ground that the evidence is irrelevant and immaterial under the issues on this action.

838

A. I think he was incompetent.

98 Q. From eleven o'clock on November 15th, 1890, down to the time of his death that night, was Mr. Fayerweather rational or irrational, in your opinion?

Mr. Bishop: That is objected to upon the ground that it does not appear that the witness was present during the interval as to which he is called upon to testify, that the question calls for an opinion upon facts and circumstances not disclosed by the testimony of the witness, and generally, that the opinion of the witness is not competent

and that the evidence is incompetent, irrelevant and immaterial under the issues raised in this action.

A. He was rational; he knew his surroundings and he was able to answer questions at that time.

99 Q. Was he in a condition of mind at eleven o'clock of that day and until the time of his death which qualified him to transact any business or to weigh or to consider any matter of serious judgment?

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Mr. Bishop: Objected to upon the ground that the question calls for the opinion of the witness and not for the facts and circumstances; and that the witness is called upon to express an opinion and conclusion upon facts and circumstances not disclosed; and generally, that the opinion of the witness is incompetent and immaterial and the question is incompetent, irrelevant and immaterial under the issues in this action.

A. No.

100 Q. When did Mr. Fayerweather finally take to his bed and remain there until his death?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. He did not remain in bed entirely at any time, you might say, sometimes he was sitting in his chair and sometimes in bed, and I do not recollect how long he was confined directly to the house, but it seems to me it was perhaps a month.

840

Mr. Bishop: I ask to have the latter part of the answer of the witness stricken out as not responsive.

Mr. Sherman: I consent. About the house, is that what you mean?

Mr. Bishop: Yes.

101 Q. To your knowledge, did he get up into his chair or was he in his chair out of bed after eleven o'clock on the morning of November 15th?

Mary R. Vedder

Mr. Bishop: I object to the question as incompetent' irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not know.

102 Q. Was he able to raise himself, and sit up in bed without assistance after eleven o'clock on the morning of November 15th, 1890?

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Mr. Bishop: That is objected to upon the ground that it appears that the witness was not present and did not see the condition of Mr. Fayerweather, and, therefore, he is not capable of forming an opinion; and upon the ground that the evidence is incompetent, irrelevant and immaterial under the issues raised in this proceeding.

A. I do not know.

103 Q. Was he debilitated by his illness on the 15th of November?

Mr. Bishop: That is objected to on the ground that it calls for an opinion without a statement of the facts upon which the opinion is to be based.

Mr. Sherman: This is an opinion—witness.

A. He was debilitated.

842

104 Q. Was he so debilitated whenever you saw him at and prior to that time for weeks, that is, eleven o'clock on November 15th, 1890, as to require assistance in moving around or in getting out of bed and into a chair?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir, he required assistance.

105 Q. Did his condition involve his lying down or lying propped up in bed?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls

for no evidence competent or material to the issues raised by the plea and replication.

A. Well, he was in both positions.

106 Q. Well, did he breathe more easily in one position than in another?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not think it made much difference; the majority of the time he was sitting up, propped up by pillows in the bed.

843

107 Q. When you examined him on the visit of eleven oclock on the morning of November 15th, when you first entered the room, did you find him propped up by pillows in his bed or lying down?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not remember.

108 Is it your opinion, Doctor, as a physician, based upon what you knew of his physical condition, from your attending him and your observation of him prior to that time, that Mr. Fayerweather could, in the afternoon of November 15th, without assistance, have sat up in bed, put his feet over the side of the bed, have taken a paper upon his lap, or a book, and a paper, and have signed his name to the paper without assistance?

844

Mr. Bishop: Objected to upon the ground that the question calls for the conclusion and opinion of this witness upon a state of facts existing at a time when he was not present, and not based upon facts in evidence, and upon the ground that upon the evidence thus far disclosed in this case there is no sufficient foundation laid for the expression of an opinion by the witness upon the

hypothetical conditions stated in the question, and upon the ground that the evidence is immaterial and irrelevant under the issues in this action.

Mr Sherman: Counsel for complainants protests that the long arguments interposed to each question by counsel for the defendant, under guise of objections, are in conflict with the settled practice of this Court and the repeated decisions of the judges thereof, and that the delay and expense attending it should not be placed upon the complainants.

A. He probably would have wanted assistance of
845
some kind.

109 Q. Did you have a nurse or a helper or attendant employed to administer massage to Mr. Fayerweather towards the end of his life?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not recollect it.

110 Q. Do you remember Mrs. Goodwin who was there as an attendant and helper?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir.
846

111 Q. Well, was she employed there in that way, do you know?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. No, sir; I do not know—I don't know, I only heard of it.

112 Q. You did not get any report from her on the Friday before his death as to his condition?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or materal to the issues raised by the plea and replica.ion.

A. No, sir.

113 Q. State whether or not his extremities, his legs to his knees, were cold the night before.

Mr. Bishop: I object to the question as being leading and improper for that reason. The witness may be called upon to state what he saw and heard.

A. Not the night before, but the day of his death
847
they were cold.

114 Q. Well, how early in the day did that condition begin, so far as you observed it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. How early in the day does it generally begin?

115 Q. No, did it in his case?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not know.
848

116 Q. When did you first notice that his extremities were becoming cold?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. At the visit in the morning of the 15th.

117 Q. And what did that condition indicate to you as a physician?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls

for no evidence competent or material to the issues raised by the plea and replication.

A. That he was dying.

118 Q. What did it indicate to you as to the extent to which he retained control over his body and his functions at that time.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Well, that they were impaired, his mind as well

849

as his body were impaired.

Mr. Bishop: I ask to have that stricken out.

119 Q. Could that condition of the coldness of his extremities in his disease as you observed it at eleven o'clock in the morning of the day of his death co-exist, according to your experience as a physician, with any mental vigor or capacity to transact business?

Mr. Bishop: I object to the form of the question as improper, and on the ground that the witness cannot be called upon to express opinions except upon facts and circumstances disclosed by him or in the evidence in a hypothetical question.

850

A. I could not judge from one symptom; his general condition was such, the coldness of his extremities, his respiration, his heart, and his general appearance indicated his condition to me.

120 Q. To be what?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. That he was dying.

121 Q. And what in reference to the matters I have enquired of?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. And it impaired, of course, his mental and his physical condition.

122 Q. Well, to what extent?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Well, to that of incompetency so far as a will was concerned.

851

Mr. Bishop: I move to strike that out, on the ground that the witness cannot testify to a conclusion.

123 Q. To what extent as regards generally any exercise of judgment upon matters of business?

Mr. Bishop: That is objected to upon the ground that the witness can only be called upon to state an opinion upon facts and circumstances either testified to by him or upon a hypothetical question upon evidence adduced by other witnesses.

A. His judgment would be materaially impaired.

852

124 Q. Well, would he or not be competent to transact any serious business involving judgment at that time?

Mr. Bishop: Objected to as calling for a conclusion and not for the opinion of the witness as an expert or physician.

A. He would not be competent.

125 Q. Now, Doctor, was the appearance which he presented at and after that time of being in a dying state such that it was manifest to laymen, or only to physicians?

Mr. Bishop: That is objected to as leading and improper in form and as not calling for an opinion based upon the facts and circumstances.

A. It certainly would be to a physician and probably to a layman.

126 Q. Do you wish to be understood as being positive as to who requested you to become a witness to this paper on November 15th, and when the appointment was made for five o'clock?

Mr. Bishop: That is objected to upon the ground that it is incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I am under the impression that it was Mr. Fayerweather.

853

127 Q. Who was present at the time?

Mr. Bishop: I object to the question as incompeent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not recollect that.

128 Q. Well, was this at the time you made this examination at eleven o'clock?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I think it was.

854

129 Q. Was Miss Anner Amelia Joyce there at the occasion of that visit, that is the lady who is now Mrs. Reynolds, was she present when you were there on that visit?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir.

130 Q. Well, was it she who made that suggestion, or was it Mr. Fayerweather, are you positive?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. No, sir; I do not recollect positively.

131 Q. May it have been Miss Joyce?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. It may have been, I am not sure who it was.

855

132 Q. Was Mr. Fayerweather at that time in such a condition of mind or body as to have made such a request?

Mr. Bishop: One moment, I object to that as leading and calling for the conclusion of the witness.

A. No

133 Q. Well, upon consideration what is your best recollection?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence, competent or material to the issues raised by the plea and replication.

A. Therefore, simply, I was going to say that I do not remember which did make the request, or who made the appointment with me.

856

134 Q. Are you positive as to the hour for which the appointment was made on that occasion? You say five o'clock.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea, and replication.

A. No, sir; I do not remember, I am not so positive of this, five o'clock, this was only my impression.

Mr. Sherman: That is all with Dr. Vedder for the present. I may think of something more later on. I tender the witness for cross-examination.

Mr. Bishop: I suppose our cross-examination will be reserved until Mr. Root is here. I am only acting for him by courtesy.

At Mr. Sherman's request the examination of Dr. Vedder was adjourned to October 14th, at 2 p.m.

Adjourned to September 30th, 1898, at 10 a.m.

MAUS R. VEDDER, M.D.

857

New York, September 30th, 1898.

Met pursuant to adjournment.

Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Bishop and Mr. Hume.

Mr. Bishop: I specifically object and except to the answers of the witness Vedder to direct questions Nos. 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 132 and 133, in addition to the grounds stated upon the record, upon the further ground that it appears that the relation of physician and patient existed between the witness and Mr. Fayerweather, and that the witness was incompetent to testify or to make answer to any of the interrogatories specified, and I move to strike out each and every of the answers.

858

Mr. Sherman: Counsel for the complainants objects to the interposition by Mr. Bishop at this time of these objections and this motion, on the ground of not having been taken by him at the time and the answers having been taken without any such objection, he is not at liberty at this time to take the objections effectively, and that the last objection has been waived; and on the further ground that the objection is not applicable to the testimony in question.

Mr. Bishop: Counsel for the defendant states that the above objection and exception is taken for the purpose of making plain and certain the grounds of objection to the questions already interposed of incompetency and irrelevancy and in order to avoid the possibility of any misapprehension before the examination of the witness is concluded.

ELIZABETH LAKE GOODWIN, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

859

Direct examination by Mr. Sherman:

1 Q. Where do you reside, Mrs. Goodwin, in the City of New York?

A. Yes, 358 West 51st street.

2 Q. What is your profession?

A. Well, massage treatment.

3 Q. Have you been a professional nurse for some years?

A. Well, yes, sir; as far as treatments.

4 Q. And have you attended many sick people in that capacity?

A. Yes, sir; a few hundreds or a thousand.

860

5 Q. And during what number of years has your experience extended?

A. From 29 to 30 years.

6 Q. Did you know the late Daniel B. Fayerweather in his lifetime?

A. Yes, sir; very well.

7 Q. And did you treat him and also his wife?

Mr. Bishop: Objected to as incompetent, irrelevant and immaterial, and as irrelevant and incompetent under the issues raised in this action.

A. Yes, sir.

8 Q. During what period did you treat Mrs. Fayerweather?

Mr. Bishop: Objected to upon the same grounds as above stated.

A. Well, off and on, for a great many years, as much as 15 years, I guess, from the first time I knew her.

9 Q. And down to the time of her death, or shortly before her death?

A. Yes, sir.

10 Q. Do you remember about when you last treated her?

A. Yes, I could tell exactly by looking on my book.

861

11 Q. Well, about the time, now, will answer, as nearly as you can answer without refreshing your memory.

Mr. Bishop: Objected to upon the same grounds as above stated.

A. Just about a week or two before she died; I treated her the week she went to the country.

12 Q. Do you remember the month that was and the year?

Mr. Bishop: That is objected to on the same grounds as above stated.

A. Well, I could give you exactly.

862

12 Q. Was it in the summer time?

A. Yes, sir; she went into the country to spend the summer.

14 Q. And that was in the second year following Mr. Fayerweather's death?

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. Yes, sir.

15 Q. Do you remember when she died, about when?

A. Yes, I heard pretty soon after she went to the country that she was taken sick and died; of course, I was not there.

16 Q. No, but her funeral occurred in New York?

A. Yes, sir; I went to it.

17 Q. Do you know when it was, was it in the summer of 1891, the summer following?

A. Yes, I could tell exactly; of course, I have not got the dates; I could have got them but I did not think that I really needed them.

18 Q. It was about a year after Mr. Fayerweather's death that she died, was it?

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. Yes, sir.

19 Q. And of what disease did she die?

863

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. Well, I do not know exactly, only I heard it was blood poisoning; I do not know as that was correct.

Mr. Bishop: I move to strike out the answer of the witness, on the ground that it appears that she had no personal knowledge.

Mr. Sherman: I consent to that.

The Witness: She was troubled with diabetes, you know when I treated her, for years.

20 Q. You mean you do not know whether that was the principal cause of her death?

A. No, I do not know, because I was not there.

864

21 Q. Did you administer massage treatment to Mr. Fayerweather prior to his death?.

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. I did.

22 Q. And down to what time before his death?

Mr. Bishop: And that also is objected to upon the same grounds as above stated.

A. The night before he passed away.

23 Q. What day of the week was that that you were there last?

A. Friday.

24 Q. How continuously or how often had you administered massage to him before that?

Mr. Bishop: That is objected to upon the same grounds as before stated.

A. Every evening.

25 Q. Was there a fixed hour when you went there?

Mr. Bishop: Objected to upon the grounds above stated.

A. Yes, sir.

26 Q. What hour was it?

A. Eight o'clock.

865

27 Q. Now state what was the customary course of events when you came there in that respect?

Mr. Bishop: That is objected to and this evidence is objected to upon the further ground that what the witness saw or heard in her capacity as a nurse is privileged and she is not competent to testify.

A. Friday evening—

28 Q. No, no; before Friday evening, what was the usual hour, at eight o'clock? What was done usually, that is the question now; we have not got to Friday evening yet.

866

A. Well when I got there, sometimes I was there maybe a few minutes before eight and sometimes just on the minute, I had to be there prompt, and when I got there Mrs. Fayerweather would, if I got there before his lying down, Mrs. Fayerweather would see that he was in bed, and she would come to the door and say "Mrs. Goodwin, Mr. Fayerweather is ready," and then I would go in the room and Mr. Fayerweather would say, "Good evening," Mrs. Goodwin," and I would say, "Good evening," and I would say, "How do you feel this evening?" "Well," he says, "about as usual, if anything; I slept pretty good last night." And I says, "I am glad of that." And sometimes he would say some other little

thing and then sometimes he would not, and then I would commence my treatments. That was generally the way when he was—sometimes if I was a little early and if he felt just like it, he would speak of different things.

29 Q. And for how long before his death was that daily occurrence?

Mr. Bishop: That is objected to upon the same grounds stated in the objection to the last question.

A. Why, I was there every evening for weeks.

30 Q. For how long?

A. For quite a number of weeks; I could have got you exactly the number.

867

31 Q. Prior to your commencing to treat Mr. Fayerweather had you performed the same service for Mrs. Fayerweather for some time?

A. Yes, sir.

32 Q. And for how long, some years?

Mr. Bishop: That is objected to upon the ground that this evidence is incompetent, irrelevant and immaterial and not within the issues.

A. Yes, sir.

33 Q. Altogether, when the treatment was not daily, how long have you altogether administered your treatment to Mr. Fayerweather before his death?

868

Mr. Bishop: That is objected to as incompetent, irrelevant under the issues in this action, and upon the ground that the witness is not competent to testify.

A. Why, off and on, between three and four years.

34 Q. Between three and four years?

A. At different times, you know, not all the time, not when he was out of the city, but when he was home.

35 Q. Well, did you become acquainted with his physical condition and state of of health and peculiarities personal to him of various kinds?

Mr. Bishop: That is objected to upon the same grounds as stated above.

A. I certainly felt I did, I am sure.

36 Q. Now, do you remember the early part of the week in which he died, as to this, as to whether he was strong or feeble, whether he would move about without assistance, or require assistance?

Mr. Bishop: That is objected to upon the same grounds as stated above.

A. Am I to answer.

37 Q. Do you remember his condition the early part of that week?

A. Oh, yes, I remember very well.

869

38 Q. What was Mr. Fayerwea[illegible]r's usual attitude in bed during that period?

Mr. Bishop: Objected to upon the same grounds as above stated.

39 Q. Was he lying down?

A. Always lying down when I came in.

40 Q. Was he lying prone, or was he raised up with pillows?

A. Why, he was lying easily in bed, don't you know, with pillows under his head.

41 Q. In the early part of the week of his death, and during the whole of that week, what was his condition in this respect, could he raise himself in bed without assistance?

870

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. He always needed a little assistance, and when he wanted to turn over, I always told him to take hold of my arm and turned him over, and when I did not Mrs. Reynolds would do so.

42 Q. That is the lady who is now Mrs. Reynolds and who was then Miss Anner Amelia Joyce?

A. Yes, Miss Joyce.

43 Q. Was she in constant attendance upon him, so far as you know, when you were there?

A. Most sure she was, because Mrs. Fayerweather was not able to.

44 Q. Did she or not administer his medicines to him, so far as you know?

Mr. Bishop: That question is objected to upon the same grounds as above

A. She always gave his medicines to him when I was there—I do not know if I should say that though.

45 Q. Was it necessary for him to turn over or move in the bed in order to facilitate your treatment of him?

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. Certainly.

46 Q. And will you say whether or not, during the last week of his life, he ever moved without assistance while he was in bed, to your knowledge?

Mr. Bishop: Objected to upon the same grounds as above stated.

871

A. When he turned over I always helped him, always, to turn over; he would always take hold of my arm. I would say, "Take hold of my arm and raise up," and then he would raise up and give me his back when I was treating him.

47 Q. Well, was that assistance necessary to his supporting himself with your arm, or to your using your muscular strength to move him?

Mr. Bishop: That is abjected to upon the same grounds as above, and also as leading.

A. Why, I done it to assist him, because he was very weak.

872

48 Q. Do you remember whether there was any change in his condition at to being weak or nervous or agitated during that week, the last week of his life, as you observed?

Mr. Bishop? That is objected to upon the same grounds.

A. I certainly did.

49 Q. Was it a change for the better or a change for the worse?

Mr. Bishop: That is objected to upon the same grounds as above, and also as calling for an opinion and not for any facts or circumstances.

A. For the better or for the worse did you say?

50 Q. Yes.

A. Well, for the worse for the two or three last days.

51 Q. About when did the change which impressed your occur in that week?

Mr. Bishop: Objected to as incompetent, irrelevant, and immaterial, and not within the issues in this action.

A. Well, along about Wednesday or Thursday, I thought I could see a change.

873

52 Q. Well, now, will you describe as well as you are able what outward appearance impressed you which you describe as a change?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial, not within the issues, and upon the ground that the witness is not competent.

A. Well, from the appearance of all the symptoms.

53 Q. Well, will you enumerate some of them? State what were the details that impressed you, so that we may know the basis of your opinion.

Mr. Bishop: Objected to upon the same grounds as above.

A. Well, I thought he was more nervous and uneasy, and I said to his wife, "I think Mr. Fayerweather has had a kind of a shock or something, he acts so nervous."

874

Mr. Bishop: I move to strike out the answer of the witness as to the conversation she had with some other person.

54 Q. Is there anything else, have you finished your answer, Mrs. Goodwin? If you can think of anything else, that answers that question, I wish you would add it.

Mr. Bishop: That is objected to upon the same grounds.

A. Well, that was Thursday and Friday. Do you mean Wednesday and Thursday?

55 Q. You are now describing this change, the symptoms and details of this change, and you have spoken about his nervousness, and what you said to Mr. Fayerweather; now I wish you would add any further facts responsive to my question as to any details at that time which impressed upon you that there was a change.

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. Well, I said all of his symptoms appeared so different, that is, he acted so different from what he always had, and he was so nervous and uneasy and
875 did not seem to rest so good, and I felt that he was growing much worse, I did not tell them, but I did not think he was going to live long, that was my opinion. But I did not want to say anything, because I wanted the doctors to do that.

M. Bishop: I ask to have stricken out the answer to the last question on the ground that it is not responsive, and as being a statement of what the witness said to some other person, and not a statement of facts, and upon the ground that it is an opinion and conclusion that she is not qualified to express, and that she is incompetent.

56 Q. What was usually the determination of your massage treatment of Mr. Fayerweather prior to the first week when you ended, what was his condition, what followed?

876

Mr. Bishop: That is objected to as incompetent, irrelevent and immaterial, and not within the issues, and upon the ground that the witness is not competent to testify.

A, Do you mean the last treatment?

57 Q. No, I mean prior to that week, at the end of your daily treatment, what was his condition, what followed?

A. Well, he always seemed—before this last week, he always seemed kind of to revive and feel better and

said he slept better, and it quieted his nerves, and I generally slipped out and left him asleep.

58 Q. Was that the case after the period when you noticed the change in him?

Mr. Bishop: Objected to upon the same grounds as above stated.

A. No, sir; it was not.

59 Q. In what respect was there a difference to that?

Mr. Bishop: Thas is objected to upon the same grounds as above stated.

A. Why, he said he was so nervous he could not sleep, and he seemed to be all uneasy and did not act like himself, like he usually had, because I would
877 always slip out and leave him asleep, and afterwards he seemed to be—he did not seem to sleep nor rest, he seemed to be all uneasy.

Mr. Bishop: One moment. I move to strike out the answer of the witness to the last question as not responsive, and as expressing opinions and conjectures and suggestions of the witness, and not any fact or circumstance.

60 Q. What was Mr. Fayerweather's condition in that last week as to being stout or emaciated, as to his being pallid or otherwise, as to his voice, as to whether it was strong or faint?

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. Well, I thought his voice was very weak.

878

61 Q. And as to the other details that I asked you?

A. And his body, too.

62 Q. What? A. He seemed to be very weak.

63 Q. What was Mr. Fayerweather's condition in that last week, as to his being stout or emaciated, as to his being pallid or otherwise, as to his voice, as to whether it was strong or faint?

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. Well, I thought his voice was weaker and his body seemed to be weaker.

64 Q. Well, was he stout or emaciated?

Mr. Bishop: That is objected to upon the same grounds as above, and upon the further ground that the witness has been already interrogated and has given her answer in full.

A. Well, he was—am I to answer the last question?

65 Q. As to whether he was stout or emaciated?

A. Well, he was emaciated, I think, and a little sick to his stomach very often.

879

66 Q. Have you any judgment as to the comparative weights of people, can you form a good judgment in your opinion as to about how much a person weighs?

Mr. Bishop: That is objected to upon the ground that it is not a proper way of qualifying a witness as an ex-expert, if that is the purpose of the question; and upon the ground that it is incompetent, irrelevant and immaterial, and that the witness is not competent to testify.

A. Well, I do not know as I could guess at the weight, but I am sure he was very poor, his limbs and his whole body, he could not have weighed very much; I could not really estimate exactly, but I think he was about as poor a patient as I ever treated.

880

Mr. Bishop: I move to strike out the answer of the witness, and particularly the last paragraph.

67 Q. Was he pallid or otherwise?

Mr. Bishop: That is objected to upon the same grounds as above.

A. Very thin.

68 Q. Pale, I said?

A. Oh, pale—his face was the best part of him.

69 Q. He was pale, you say?

A. Yes, rather pale, and still his face always looked the best, he did not show his weakness so much in his face as he did in his body.

70 Q. Now, we come down to the Friday before his death. At what hour did you arrive at the house on that night?

Mr. Bishop: That is objected as incompetent, irrelevant and immaterial.

A. At eight o'clock, sharp.

71 Q. And whom did you find there when you arrived?

Mr. Bishop: That is objected to upon the same grounds.

881

A. I found Miss Joyce, who is Mrs. Reynolds now, and Mrs. Fayerweather, as usual, and Mr. Fayerweather.

72 Q. Mr. Fayerweather's bedroom was the rear room, that is, the north room on the second floor of the house, 11 East 57th street, in the City of New York, was it not?

A. Yes, sir.

73 Q. And what was the front room on that floor used for, the south room?

A. For a sitting room.

74 Q. And was there a passage way between the two rooms?

A. Yes, sir.

75 Q. And about how long was it?

A. Why, I should think it was quite as long as this room.

882

76 Q. About twenty feet?

A. I should think so.

77 Q. And how wide was it?

A. Well, I do not know the feet, but it was a good wide one.

78 Q. Was it fully as wide as that door?

A. Oh, yes.

79 Q. A little wider, if anything?

A. Yes, a little wider, I think.

80 Q. Nearly five feet wide?

A. I should think it was; you know, I never notice those things particular.

81 Q. Where was the bed in the north room in which Mr. Fayerweather lay when you saw it?

Mr. Bishop: Objected to upon the same grounds as above stated.

A. It set with the head east.

82 Q. In the middle of that north room?

A. Yes, about the middle of the room, with the head east.

883

83 Q. With the head against the east wall of the room?

A. The head against the east wall.

84 Q. When you arrived there that night, did you go first into the sitting room?

A. Yes, sir.

85 Q. And did either of the ladies go in there before you did to prepare him or for any other purpose, either Mrs. Fayerweather or Miss Joyce?

A. Yes, sir; Mrs. Fayerweather always went in first.

86 Q. And did she that night?

A. She was in when I went there.

884

87 Q. And then Miss Joyce was in the front room?

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. I think she was.

88 Q. Did Mrs. Fayerweather come out to you afterwards?

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. She always come and she did this evening, she come to the door and said, "Mrs. Goodwin, Mr. Fayerweather is ready, and he is already in bed because he don't feel quite so well this evening."

Mr. Bishop: I move to strike out the portion of the answer as to what was stated by Mr. Fayerweather.

89 Q. Did you then go into his room?

Mr. Bishop: That is objected to upon the same grounds as above.

A. I did.

90 Q. Well, what did you do then, what did you then observe?

Mr. Bishop: That is objected to upon the same grounds as above, and upon the further ground that the witness is not competent to testify to anything that took place between herself and Mr. Fayerweather, upon the ground of professional privilege.

885

A. I went in as I always did, and I said, "Good evening, Mr. Fayerweather," and he didn't pay no attention to me, and he was a little hard of hearing, so I stepped up towards his head and put my hand on his forehead, and I said, "Good evening, Mr. Fayerweather, do you know I am here?" And he said, "Uh" (nodding). So I spoke the second time, I said, "Good evening, Mr. Fayerweather, and put my hand on his forehead like. I thought maybe he was dozing, and I said, "I am here," and he said "Uh." And it was so unlike him, a kind of a shock went through me, and I kind of put

886 my hand on his forehead, and he never said anything, and it was so unlike he had ever done before, and then I stepped back to the front of the bed like, there was my little chair there that I always used, and I put my hand under the cover on his limbs from the knees down and on his feet, and they felt very cold and there was a kind of a shock went over me and I said, "My, Mr. Fayerweather is dying," and I waited a few minutes and I didn't say anything more and I got nervous myself, and at that I put the cover over him and slipped out into the room—

91 Q. Into the front room?

A. Into the front room, in the sitting room; and I said to the ladies, "I do not think I will disturb Mr.

Fayerweather to-night, he seems so—I don't know—as if he had had a shock or something; he seems so quiet and drowsy, and don't seem to speak, and I don't think I will disturb him, and I will come in to-morrow night," I said, "to see him," and Mrs. Fayerweather said, "Well, why, Mrs. Goodwin?" and I said, "Because I do not think it is best to disturb him," and I felt then that Mr. Fayerweather had a shock of death, but I did not say it, but I said, "I will come around to-morrow evening," and at that I went out, I did not tell them what I thought.

Mr. Bishop: I move to strike out the answer of the witness upon the ground—

887

The Witness: I did not quite finish that.

Mr. Bisnop: Didn't you? Then I will wait.

The Witness: I said to Mrs. Fayerweather, "Mr. Fayerweather has had a very bad shock of some kind, do you know?" and she says, "No, I don't." I didn't know whether it was paralysis or what.

Mr. Bishop: Now I move to strike out the answer of the witness and specifically those portions of the answer which relate to statements made by her to Mrs. Fayerweather and other persons, and also those portions of her answer which describe her own thoughts and mental operations which were not disclosed, and upon the ground that the entire interview is incompetent and that the witnes is incompetent to testify about the same.

888

92 Q. I now ask you whether, from Mr. Fayerweather's conversation and appearance as you have detailed it and as you saw it and heard it, down to the Friday night in question, Mr. Fayerweather was in your opinion capable of comprehending or understanding a document or writing of any considerable length if it had been read over to him on that day or the next day?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial, and not within the issues, and upon the further ground that it calls for the opinion of

the witness and her conclusion, and not for facts and circumstances, and that the witness is not shown to be competent to render an opinion, and upon the further ground that the witness is incompetent to testify, because of her relations with the deceased, I mean to say that her testimony already shows that she was called in and was acting at that time in a professional capacity as a professional nurse, and upon the further ground that it calls for an opinion upon a state of facts at a time when the witness was not present, to witness, upon the day following her visit.

A. I do not think he was competent, not when I saw him last.

889

93 Q. What capacity when you saw him last had he to understand business matters, in your opinion?

Mr. Bishop: That is objected to upon all the grounds stated above.

A. Well, I think he was too feeble to be troubled with it at all; he as much as said so to me.

Mr. Bishop: I move to strike out specifically the last portion of that answer as not responsive.

94 Q. Aside from his statements to you, what do you say as to your opinion of his capacity when you last saw him alive, to understand business matters?

890

Mr. Bishop: That is objected to upon all the grounds stated in my last objection.

A. Well, I do not think he was able to do any business at all the last time I saw him.

95 Q. In your opinion, what was his capacity when you last saw him to make an intelligent disposition of his property?

Mr. Bishop: That is objected to upon all the grounds stated above.

A. Well, I do not think he was capable at all when I last saw him.

96 Q. From his condition in that respect when you last saw him, what is your opinion as to his capacity the following day, the day of his death, to make an intelligent disposition of his property?

Mr. Bishop: That is objected to upon all the grounds stated above, and upon the ground that it calls for the opinion of the witness on a condition existing at a time when she was not present.

A. Well, he must have changed very much in a few hours if he was able to do anything.

891

97 Q. Have you in your experience, Mrs. Goodwin, prior to that time, attended patients who were near the point of death and who died soon after?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial, and not within the issues.

A. Yes, sir.

98 Q. Many?

A. A great many.

99 Q. And have you or not become familiar with the changes in the bodily and mental strength of people suffering from mortal diseases?

Mr. Bishop: That is objected upon the same grounds as above stated, and also as not laying any foundation for an opinion on the part of the witness and not calling for any facts.

892

A. Yes, indeed, a good many, and I have never missed it.

100 Q. Based upon that experience, I ask you whether, when you last saw Mr. Fayerweather alive and awake, his mind and memory were sufficiently sound to enable him to know and understand the business in which he was engaged when, on the day of his death, an addition to his will was made which added to the residuary legatees of a large sum of money an additional person?

Mr. Bishop: That is objected to upon the ground that it is incompetent, irrelevant and immaterial and not with-

in the issues, and upon the further ground that it calls for the opinion of the witness upon the condition of the testator at a time when the witness is not shown to have known what his condition was, and that the question is purely hypothetical and conjectural, and upon the further ground that the witness is incompetent to testify by reason of her professional relation.

A. I do not think he was capable, because I think he had lost his hearing and his eyesight.

101 Q. Do you mean to give—

A. I think he could hear and could see, but they were so weak that you would have to speak more than once to make him hear.

893

102 Q. Were there any other reasons beside his hearing and his eyesight which gives you the opinion which you expressed that he was not then capable of understanding that business?

Mr. Bishop: That is objected to upon the grounds stated in the objection to the previous question, and upon the further ground as assuming that the witness has testified to what she has not testified to.

A. Well, the reason why, because all these symptoms follow the last shock of death.

103 Q. What symptoms do you refer to?

894

Mr. Bishop: I object to that upon the same grounds as stated above.

A. They don't hear so plain and they don't see so clear, and I have had the experience of those things so much that I judge it from what had happened so many times that I knew it was true.

104 Q. In your opinion, based upon what you have stated that you observed, was Mr. Fayerweather able on the day of his death to understand the effect and operation of his will upon his property and those entitled to receive it?

Mr. Bishop: That is objected to upon the grounds stated in the objection to the previous question.

A. No, sir; not the last time I saw him.

105 Q. Was he able in your opinion the next day, based upon what you saw the previous day?

Mr. Bishop: That is objected to upon all the grounds stated in the objection to the previous question, including the objection that the question calls for an opinion upon a condition and state of facts existing subsequent to the time when the witness saw the deceased, and as to which she is not shown to have any personal knowledge.

A. No, sir, because—

895

Mr. Sherman: That is enough.

Mr. Bishop: Let her finish her answer.

The Witness: The next evening when I called they said he was dying, and I am sure he could not have been any better or else he would not have been dying.

Mr. Bishop: I ask to have stricken out so much of the answer of the witness as to what was said about the following day.

106 Q. In communicating with Mr. Fayerweather when he was last awake when you were there, could he do more than answer simple questions?

896

Mr. Bishop: That is objected to upon all the grounds stated in the objection to the previous question, and upon the further ground that it is leading.

Mr. Sherman: The question is withdrawn.

107 Q. In what manner, when you last saw Mr. Fayerweather alive and awake, was your communication with him carried on?

Mr. Bishop: That is objected to upon all the grounds stated above, and objected to, also, as incompetent, irrelevant and immaterial and not within the issues, and upon the ground that the witness is not competent to testify because of her relations to the deceased, and upon the further ground that the witness has already been exami-

ned with regard to the interwiew and has stated what then and there took place and cannot be asked to characterize it.

A. Well, the last few days he had very little to say, and so far as business, he never talked to me; he said he would love to get strong enough and well enough to accomplish some little things he had in view.

108 Q. How recently did he say that?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial and not within the issues, and upon the ground that the witness is not competent to testify.

A. Oh, a week or two before he died.

897

109 Q. In what manner, when you last saw Mr. Fayerweather alive and awake, was your communication with him carried on?

Mr. Bishop: You repeat the question and I repeat the the same objection.

A. Well, very little; he did not talk very much, he never spoke of anything very particular, only he hoped he would get strong enough and well enough, that he had a good many things in view that he would like to do. I used to encourage him once in a while and tell him—

898

110 Q. I do not think you quite understand my question?

A. I do not know as I did.

111 Q. Was Mr. Fayerweather able to articulate distinctly when you last saw him awake and alive, could he speak plainly and clearly?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial, and not within the issues, and on the further ground that the witness is not competent because of her relations to the deceased to testify, and, further, that the question is leading.

A. Do you mean Friday evening?

112 Q. I mean Thursday, if that was the last time you saw him awake?

A. Wednesday and Thursday he said always as usual when I went in, only he seemed to have less to say—"Good evening," very low, "Good evening," very low, and he passed a few remarks and then—he was unlike what he always had been to me, and there was where I felt he was growing worse instead of better.

Mr. Bishop: I move to strike out the last answer as not responsive.

Mr. Sherman: You may cross examine.

ELIZABETH GOODWIN.

899

Mr. Bishop: Now, Mr. Sherman, I want to reserve this cross-examination until Mr. Root comes here.

Mr. Sherman: I desire to have noted on the record that the complainants tender the witness for cross-examination.

Mr. Bishop: I desire to have the cross-examination postponed until Mr. Root comes here.

Mr. Sherman: I will consent to adjourn the cross-examination of this witness until two o'clock, provided that you will stipulate on the record that we may take up the testimony of other witnesses in the meantime without any objection as to the order of the proof.

900

Mr. Bishop: I do not see how Mr. Root can cross-examine until the testimony is written out.

Mr. Sherman: Mr. Examiner, I ask you to call upon the defendants to cross-examine this witness, and if they do not do it, I ask you to declare the examination closed.

The Examiner: The direct-examination closed?

Mr. Sherman: No, the examination. I have a right now to have her examination closed.

The Examiner: If the gentlemen want to have the cross-examination stand over until two o'clock, that can be done.

Mr. Sherman: I do not think you have any right to adjourn the cross-examination, under the circumstances.

The Examiner: I will let the whole matter stand over until two o'clock, and will direct the witness to be here at two o'clock for cross-examination, and if the counsel for the defendants is not ready to cross-examine the witness at that time, the witness may sign her deposition and the defendants will have to bring the witness back at a further time at their own expense if they wish to cross-examine.

901

Mr. Sherman: Will you consent to go on with the other witnesses in the meantime?

Mr. Bishop: Yes.

Signed,

ELIZABETH GOODWIN.

Sworn to before me
March 1, 1899.

JOHN A. SHIELDS, *Examiner.*

THOMAS G. RITCH, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

902

Direct examination by Mr. Sherman:

1 Q. (Handing book.) I will ask you to look at what purports to be a receipt from the Surrogate's Records for the will and codicils of Daniel B. Fayerweather, deceased, and ask you whether you recognize the handwriting of the receiptor?

A. Yes, it is the handwriting of a clerk, a clerk of the firm.

By Mr. Blaikie:

2 Q. Of Arnoux, Ritch & Woodford?

A. Yes.

By Mr. Sherman:

3 Q. What is the name of the clerk?

A. Mr. MacArthur.

4 Q. Give his full name, please.

A. John R. MacArthur.

5 Q. Was he authorized to sign the name of Arnoux, Ritch & Woodford to that receipt?

A. If he received the will he was.

903

6 Q. Have the will and codicils been in your possession since that receipt?

A. I have made inquiries about it since I was here and the information that I got was that it was taken from the Surrogate's office and then returned.

7 Q. Have the will and codicils been in your possession since that receipt?

A. I have not seen the will or codicils, any of the codicils, for years.

8 Q. Have the will and codicils been in your possession since that receipt?

A. I don't know.

904

9 Q. Have you been in this room before the occasion when you were sworn this morning?

A. Only as I was here this morning.

10 Q. And then you went away again and obtained the information that you now give?

A. Yes.

11 Q. Did you state at that time when you were here previous to this to-day, that if the will and codicils were in your possession they were in a locked box to which Mr. Bulkley had another key, that Mr. Bulkley would be out of town, probably until Monday, and that it would be necessary for both of you to use your keys in order to open that box, or did you state that in substance.

A. I stated that in substance. Since then, I have made inquiry and have been told that they were not in the box.

12 Q. You have not looked in the box since making this statement, have you?

A. I have not.

13 Q. Mr. MacArthur is Mr. Stewart L. Woodford's son-in-law, is he not?

A. No, sir.

14 Q. What relation is he to Mr. Woodford?

A. None. He was his secretary when he was at Madrid.

905

15 Q. Is he related to any member of your firm by blood or marriage?

A. No present member of our firm. He is a son-in-law of Mr. Arnoux, who left the firm in January, 1896.

16 Q. Is Mr. MacArthur now employed by your firm?

A. He is not.

17 Q. Do you know where he can be found?

A. Hotel Continental, Paris.

18 Q. By whom were you informed that the codicils and will were returned to the Surrogate's office after the date of that receipt?

906

A. I was told by Mr. Myrick, who is the clerk of the trustees; he said that was his impression and belief.

19 Q. Did he tell you who had taken them to the Surrogate's office last?

A. He did not.

20 Q. You will not yourself swear that they are not in that box that you spoke of this morning?

A. No, sir; I will not. I was only subpœnaed at 9.30 this morning, and I have had no opportunity to make a search.

21 Q. When will you be able to make such a search as will enable you to state whether the will and codicils are in that box you refer to?

A. On Tuesday.

22 Q. What time Tuesday?

A. Whenever Mr. Bulkley can go with me.

23 Q. Will you at the earliest opportunity make such a search and attend here at two o'clock on Tuesday and state the result of it?

A. Yes, if it is desired.

24 Q. Did Mr. Myrick tell you who it was that had taken these papers back to the Surrogate's office, or what his impression was as to who it was?

A. He did not.

907

25 Q. Well, did you not inquire of him?

A. I asked him if they were not in the box, and he said he was quite sure they were not, that he thought that they were taken back after the trial to the Surrogate's office. My counsel would know better than I about that.

26 Q. To whom do you refer by that?

A. Mr. Bovee, particularly, I would say Mr. Bovee or Mr. Parsons.

27 Q. Is Mr. Parsons your counsel?

A. Counsel for the other two executors?

28 Q. And not for you?

A. Not for me.

908

29 Q. What was the occasion of returning these papers, this will and codicils, to the Surrogate's office at the time subsequent to the date of this receipt now shown you?

A. I do not know.

30 Q. Did Mr. Myrick tell you what the occasion was?

A. He did not.

31 Q. So far as you know, has either Justus L. Bulkley or Henry B. Vaughan had the possession of the will and codicils of Daniel B. Fayerweather, except in your connection with the custody of them?

A. I do not know; I should say that I do not think so.

32 Q. If they were returned to the Surrogate's office, they must have been returned from your custody, is that not so?

A. I think it probable.

33 Q. According to your mode of doing business in your office would such papers be returned to the Surrogate's office after you had given a receipt to the Surrogate for them without any record in your office of the fact that they had been so returned and the occasion
909 therefor?

A. There ought to be a record; I do not know that there is.

34 Q. Have you come here and given Mr. Myrick's impressions on that subject without yourself examining your customary records to see what they showed on the point?

A. I asked the question about five minutes before I came here, and it would take perhaps half an hour or an hour to look through the very voluminous entries in the various matters.

35 Q. Do you observe that the date of your receipt for the will and codicils is April 18, 1893?

A. I do. That will help me to look for entries.
910

36 Q. Will you look into your records between now and two o'clock and attend here at that time with such information as your records have on that subject, and if there be any entry of the return of that will and the codicils in your records to the Surrogate's Court, will you produce the record at that time?

A. The man to whom I should give the matter of looking up the record is ending his vacation to-day, and Mr. Bovee, who would know also where to look, is out of town to-day.

77 Q. In the distribution of the business in your office, you have charge of the office records, have you not, yourself?

A. Some of the time.

38 Q. Have you not on previous occasions testified that you customarily had such charge in the distribution of the business of your office?

A. Except in matters where I am client and other people are—the other members of the firm represent me; I don't keep track of entries or records in those matters.

39 Q. And with that exception, the records in your office are under your immediate personal supervision, is not that so?

A. Yes, through clerks.

911

40 Q. You do not mean to convey that the records with reference to the sepapers are put into separate books in order that you should not know about them, do you?

A. There are so many different heads which have been directed by others and in charge of others that I have not the knowledge of where to look that I would have in my ordinary business.

41 Q. Do you mean to say here that you are not able in the absence of Mr. Bovee and some other gentleman whom you do not name, to ascertain in the records of your office whether there is any entry of the return to the Surrogate's office subsequent to April 18, 1893, of the original will of Daniel B. Fayerweather and the codicils?

912

A. I mean to say that it will be much easier and will take less time if I give the matter to one of them to look up for me.

42 Q. Well, you mean it will take less of your time and more of ours, do you not; in other words, we will have to wait some time if we have to wait for that? In what time can you find such an entry, if it exists?

A. I have no idea.

43 Q. Well, I will have to ask you to make the effort and attend here at two o'clock and state the result of it?

A. Very well.

Mr. Sherman: Counsel for the complainants call upon the counsel for Hamilton College to produce the original will and the five codicils thereof admitted to probate, inviting their attention to the fact that they offered the original will in evidence, and it was in their custody on the 24th of January, 1894, upon the trial of the case of the Trustees of Amherst college against Ritch, before Judge Truax, as appears from Folio 141 at page 47 of the record thereof.

613

Mr. Bishop: I state that as far as I know the will and codicils were never in the posession of the counsel for Hamilton College, and are not now in their possession. If they were produced at all on the occasion referred to they were produced under subpœna by some other person and were left in the custody of such person.

44 Q. (Handing paper.) I show you Voucher No. 280, this paper, and I ask you if you know in whose handwriting the body of it is, and in whose handwriting is the signature?

A. The body, the handwriting is Mr. Myrick's, and whose handwriting the signature is I do not know.

45 Q. In other words, all of the paper which is not printed is in the handwriting of Mr. Myrick, except the signature?

A. Yes.

914

46 Q. And whose the signature is you do not know, is that the correct interpretation of what you say?

A. That is a correct statement.

47 Q. Did you file that paper as a voucher in your capacity as executor of the last will and codicils of Daniel B. Fayerweather?

A. I think so.

48 Q. Did you file it as a receipt of Evarts, Choate & Beaman?

A. I have no recollection, but I should presume so.

49 Q. Well, are you able to say whether you got that receipt back from Evarts, Choate & Beaman upon the payment of that amount?

Mr. Bishop: Objected to as incompetent, irrelevant and immaterial, and not within the issues.

A. There are no marks upon it that give me any information about it.

50 Q. Are you able to say whether you got that receipt back from Evarts, Choate & Beaman upon the payment of that amount?

915

Mr. Bishop: Objected to as incompetent, irrelevant and immaterial and not within the issues.

A. I do not remember; I can only say I presume so. Where is the mark of its being a voucher?

51 Q. On the end.

A. I see it.

Mr. Sherman: I ask to have it marked for identification.

The paper is marked Complainant's Exhibit 1, for identification, September 30, 1898, J. A. S., Exr.

Mr. Sherman: I will read it.

Mr. Bishop: Then I object to it.

Mr. Sherman: It is only marked for identification.

916

Mr. Bishop: I object to the document which is marked for identification being read into the record as a part of the record.

Mr. Sherman: (Reading)

(In the margin) "Voucher No. 280.

New York, Feby. 8, 1892.

Received of the executors of the estate of D. B. Fayerweather the sum of Five thousand dollars in payment for legal services as per bill September 17, 1891.

$5,000.00

EVARTS, CHOATE & BEAMAN."

Mr. Sherman: I ask the Examiner to make the direction that the witness shall make a search and come here at two o'clock.

The Examiner directs the witness to be here at two o'clock.

At the request of the witness, he stating that it will be more convenient to return at two-thirty, the Examiner directs the witness to be here at two-thirty p. m.

THOMAS MARSAC, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

917

1 Q. Mr. Marsac, you are employed in the office of the Surrogate of the County of New York, are you not?

A. Yes, sir.

2 Q. Have you brought from that office the official book containing receipts for papers?

A. Yes, I have brought the general index of wills for the years 1890, 1891 and 1892.

3 Q. In that record is there a receipt for the will of Daniel B. Fayerweather?

918

Mr. Bishop: Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir; there is that receipt (indicating).

Mr. Sherman: I offer the receipt in evidence.

Mr. Bishop: I object to it as incompetent, irrelevant and immaterial.

Mr. Sherman: It is as follows:

"Fayerweather, Daniel B., 1890. Will filed 8th December. Petition filed 8th December. Objections filed 15th December. Will admitted 4th March. Liber page on decree, Executors, Ancillary Executors, c. t. a., who have qualified: Justus L. Bulkley, Thomas G. Ritch, Henry B. Vaughan. Residences of: 787 Madison avenue; Stamford, Connecticut; Orange, New Jersey. Letters issued

28th February, 1891; 26 March, 1891; record liber page 7980, 23753. Attorneys for petitioner, Arnoux, Ritch and Woodford, 18 Wall street. Contest. Objections filed 15 December, 1890. Order permitting Lucy Fayerweather to withdraw waiver and to file objections within three days, entered December 12, 1890. C. L. T."

Under the heading "Receipt for will delivered after one year from date of probate or will to remain on file."

"Received original will, April 18, 1893, Arnoux, Ritch and Woodford, J. R. M."

919

4 Q Do you produce from the Surrogate's records the paper shown the last witness and marked Complainant's Exhibit 1 for identification?

A. Yes, sir.

5 Q. Where did you find that paper?

A. In the accounting among the vouchers in the estate of Daniel B. Fayerweather in Box 150. They have a special tin box for that estate.

6 Q. Is that the place where the will and codicils of Daniel B. Fayerweather would be kept in the course of the business of the office if they were in the office?

A. Well, do you mean if there was no receipt in this book?

920

7 Q. If they were in the office, is that box where they would be kept?

A. Yes, sir; in that box.

8 Q. Have you looked in that box this morning to learn whether the will and codicils are there?

A. Yes, sir.

9 Q. Are they there?

A. They are not.

10 Q. Are you able to give any account of the disposition of them except such as appears in the receipt just produced?

A. No, sir.

Cross-examination by Mr. Bishop:

11 XQ. Were you connected with the Surrogate's office in 1894?

A. Yes, sir.

12 XQ. Do you remember the trial of the Fayerweather case before Judge Truax?

A. Well, no, I cannot say that I do.

13 XQ. Did you have charge of the papers in the office?

A. Yes, sir.

14 XQ. Do you remember the will and codicils were produced on any trial?

A. Well, between that date—

921

15 XQ. Yes, between 1893—

A. Between March 15th and April 18th, 1893?

16 XQ. Between April, 1893, and the present time?

A. No, sir.

17 XQ. Do you remember having produced them?

A. I do not remember any such thing; I do not remember ever having the will after that date.

Adjourned to 2 p. m.

After Recess:

922

Present: Mr. Sherman, Mr. Blaikie, Mr. Root, Mr. Bishop, and Mr. Putney.

Mrs. Goodwin attends for cross-examination.

Mr. Root: Mr. Examiner, I move to strike out the entire testimony of this witness, upon the ground that it is not upon the issues joined by the plea and replication, and upon the ground that it is not within the issues, and I ask you to certify that motion to the Court and to certify to the Court the several objections made to the testimony of this witness by Mr. Bishop upon examination.

Mr. Sherman: That is not the practice, Mr. Examiner. If the witness is not cross-examined, the deposition must be closed.

The Examiner: But he comes in now and asks me to certify the record to the Court, and I am bound to certify the record to the Court and have the Court pass upon it. I cannot pass upon it. It is my duty to certify the record to the Court whenever I am asked to do so.

Mr. Sherman: The point is this: Mr. Root desires to have us stop now while you certify the record to the Court.

Mr. Root: I did not say anything about stopping. The Examiner states that he will certify the record to the court at the request of the defendant's counsel.

923

Mr. Sherman: Counsel for the complainants ask the Examiner to require the counsel for the defendant to cross-examine the witness or the deposition will be declared closed. I ask you to perform your duty as Examiner, and that duty is to call upon them to cross-examine or declare the deposition closed and allow the witness to sign it. There is no other alternative for you.

The Examiner states that his understanding of the practice in this Court is that when counsel on either side asks him to certify the record to the Court, it is his duty to do so, and that he cannot proceed with the examination until the Court has passed upon that question, unless upon consent of counsel for the respective parties.

924

Mr. Sherman: Counsel for complainants protests against the construction of the practice by the Examiner and demands that he either require the counsel for the defendant to cross-examine the witness or to declare the deposition closed, and insists that whether he does or not, that is the legal effect of the refusal to cross-examine, and he protests against the suspension of the examination and the interruption of the notice of it at the instance of this defendant upon a motion which the Examiner has no jurisdiction whatever to take any notice of. I think on reflection that you will agree with me

that the practice of stopping has been due to the fact that everybody wanted to go in and have the question decided, but that no Court has ever decided that you have any power to stop our notice and proceedings.

The Examiner: The practice has been to go before the Court whenever either side asked the Examiner to certify the record to the Court.

Mr. Sherman: We decline to have our testimony interrupted by a motion of this kind and the contention that we cannot take any more testimony until it be disposed of.

925

Mr. Root: I do not propose to cross-examine the witness until the Court has passed upon our motion.

Mr. Sherman: Then I ask to have the deposition declared closed.

Mr. Root: Is there any further testimony to be taken under this notice? If not, then I suppose we can go.

Mr. Sherman: May I inquire for my information whether the examiner holds that the precedents require the suspension of the depositions when the request of counsel on one side is not accompanied by an offer to go instanter before the Court and have the question determined?

926

The Examiner: How is that?

Mr. Sherman: I mean to say, have you ever before suspended the depositions except where, in connection with the objections, the counsel agreed to go at once before the Court?

The Examiner: Or the next motion day.

Mr. Root: We will go before the Court on the next motion day, next Wednesday.

Mr. Sherman: Counsel for the complainants protests against the suspension of the examination and insists that it is his right to have this witness cross-examined now and declines to be responsible for her further production for cross-examination unless she is cross-exam-

ined now, and claims and will claim that the course adopted by the counsel for the defendant is a waiver of the right to cross-examine her.

Mr. Root: Mr. Examiner, I make the same motion in regard to the testimony of Dr. Vedder, and I will ask you to certify that to the Court, and I ask you also to certify to the Court the several objections made by Mr. Bishop to the testimony of Dr. Vedder, so that they may come up at the same time as the questions regarding the testimony of the last witness.

The Examiner states that he will so certify.

927

Mr. Sherman: I ask you to note on the record that Mr. Ritch does not attend.

The Examiner: The Examiner certifies to the Court that he directed the witness Thomas G. Ritch to be here at 2.30 and that at 2.40 he called the witness and the witness failed to respond.

Mr. Sherman: Counsel for complainants states that as the witness is not in attendance and as the counsel for the defendant declines to cross-examine the witness now produced for cross-examination, he is compelled to ask the Examiner to adjourn the further taking of testimony under the notice until Tuesday next at two o'clock in the afternoon.

928

New York, October 4, 1898.

Met pursuant to adjournment.

Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Hume and Mr. Bishop.

(The witness, Thomas G. Ritch, is present for further examination.)

Mr. Sherman: I desire to examine Mr. Ritch.

Mr. Hume: I desire to make an application for an adjournment on account of Mr. Root's unavoidable absence.

Mr. Blaikie: That is not a legal excuse.

Mr. Sherman: I am going on. I do not propose to be delayed by any such excuse as that.

Mr. Hume: Before going on, I desire, then, to make a motion to strike out the entire testimony of this witness upon the ground that it is not upon the issues joined by the plea and replication, and upon the ground that it is not within the issues, and I ask you to certify that motion to the Court, and to certify to the Court the several objections made to the testimony of this witness by Mr. Bishop upon the examination. And I desire to ask for an adjournment of any further examination pending a decision by the Court upon that motion.

929

The Examiner: When do you wish this certified to the Court?

Mr. Hume: Next Thursday.

Mr. Sherman: Counsel for complainants protests against the practice and insists that interlocutory applications of this sort in the midst of a witness' deposition are not within the correct practice and insists upon his right to go on with the deposition of the witness, which is not yet concluded; and further protests against the interruption of the taking of testimony generally under the notice for any such cause.

930

The examiner states that he will certify the record to the Court on Thursday at twelve o'clock, at the request of counsel for the defendants.

Mr. Sherman: What about going on to-day?

The Examiner: I will adjourn these proceedings until next Friday at two p. m.

Mr. Sherman: Complainant's counsel excepts to the direction of the examiner suspending the further taking of testimony under the notice.

The examiner directs the witness to attend on Friday at 2.00 p. m.

Adjourned to October 7th, 1898, at 2 p. m.

At the request of the defendant's counsel the foregoing record is certified to the Court.

JOHN A. SHIELDS,
Examiner.

Ordered that said Prescott Hall Butler attend before the examiner herein at 2.30 p. m. on the 25th day of October, 1898, or at some other convenient time to be agreed upon, and then and there answer, if he knows, as to whether or not a paper prepared by himself as counsel was in fact signed by Daniel B. Fayerweather in the pre-

931

sence of attesting witnesses in the form and manner to constitute a valid publication of said paper as a testamentary document; and, if he knows, and as far as he knows, state the contents of such published document, if he testify that the document was in fact thus published. The objection to all other questions inquiring as to conversations and transactions with his client, or his client's agent, leading up to the preparation and execution of such document, are sustained.

October 24th, 1898.

E. H. LACOMBE,
U. S. Circuit Judge.

932

October 7, 1898.

Met pursuant to adjournment.

Present: The Examiner, Mr. Blaikie and Mr. Hume.

Mr. Ritch attends for cross-examination.

At the request of counsel for complainants' adjourned to October 12th, 1898, at 10:00 a. m.

New York, October 12th, 1898.

Met pursuant to adjournment.

Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Root and Mr. Hume.

The following is the decision of Judge Lacombe on motion to strike out testimony:

UNITED STATES CIRCUIT COURT

SOUTHERN DISTRICT OF NEW YORK

FAYERWEATHER, and ano.,

933 *against*

RITCH, and ors.

Motion to Strike Out Testimony.

LACOMBE, Circuit Judge:

Personally I do not think that the testimony objected to is relevant under the issues raised by the plea, but it is evident that complainants' counsel is of a different opinion, since he is putting his clients to considerable expense in putting it in. It may be that he could persuade the Appellate Court to take his views of the issues, and if so, under the rule adopted by the Supreme
934 Court and construed in Blease v. Garlington, the testimony, although the Judge of the first instance deems it irrelevant, should be incorporated in the record. It does not seem, therefore, that this motion should be granted. The continued taking of this testimony would a hardship to defendant were it not that complainant has offered to stipulate the opposing counsel need not attend to register objections and reserve objections to the testimony, but may raise such objections after the testimony is taken and before the record is made up for argument. This certainly makes the archaic, cumbersome and unsatisfactory method of taking testimony in equity in the Federal Courts as little of a burden to defendants as it can be

made. In view of the decision in Blease v. Garlington this Court seems powerless to afford any greater measure of relief.

The proffered stipulation is approved and motion denied.

Counsel for the complainants stipulates that opposing counsel need not attend to register objections and reserve objections to the testimony, except objections to form, but may raise such objections after the testimony is taken and before the record is made up for argument, except objections to form which could be removed upon
935 their being taken at the time of propounding the question. This stipulation applies only to future, and prior stipulations and withdrawals thereof must rest on their own grounds.

Continuation oi the examination of *THOMAS G. RITCH.*

By Mr. Sherman:

52 Q. Mr. Ritch, are you now able to give us more information than you were at the time of your last examination herein as to the whereabouts of Mr. Fayerweather's will and probated codicils thereto?

936

A. I do not know where they are and I have made all the investigation that I thought would lead to their discovery.

53 Q. Have you examined the box which was locked by two keys, one held by you and the other by Mr. Bulkley, as you testified?

A. Yes, I went there with Mr. Bulkley the day before the last adjournment, I think on Monday last, and we went through that box carefully and neither the will nor any one of the codicils was there.

54 Q. Do you recall the fact that your firm appears to have given a receipt to the Surrogate's Court for the will, dated on or about April 18th, 1893,

A. I do.

55 Q. You were asked to look into the dockets of your office where entries of the outgoing and incoming of such papers would in the course of your business naturally be found, to ascertain whether any entries at or subsequent to that date appeared on the subject. Have you done so?

A. I did. I looked three months after and a month before. My recollection is quite clear that—

56 Q. Well, you have not said whether you found any such. You say you looked.

A. I have not found any such entries.

937

57 Q. And are there any entries in your office dockets or registers subsequent to April 18, 1893, indicating or showing any disposition of that will and those codicils down to this time?

A. I found none, and my clerks have found none.

58 Q. Are you prepared to say that there are none?

A. I am quite sure there are none.

59. Q. I will ask you to produce here at the next session all the records in which such entries could be found if they existed. Will you do so?

A. If I am directed to.

60. Q. From whom do you desire a direction?

A. I shall turn the matter over to Mr. Bovee and Mr. Wallace and let them tell me what to do.

938

61. Q. Do you mean to say you will produce evidence called for by the complainants if the counsel for the defendants or some of them direct you to do so; is that what you mean?

A. I will do whatever I am directed to do by my counsel.

62. Q. Is it necessary for me to apply to the Court for a direction to you on that subject?

A. No, I think not.

63. Q. Will you produce those books at the next session?

A. Yes.

64. Q. What is the most recent occasion when your mind has been charged with the existence or whereabouts of the will and codicils, the probated codicils, of Mr. Fayerweather?

A. I know that they were produced on the trial before Judge Truax, whenever that was, and there is a memorandum in the printed book to that effect.

65. Q. Do you refer to the statement in the printed book that those papers were produced by Mr. Root on the trial of that case?

A. Yes.

939

66. Q. Were you in Court at the time?

A. I was.

67. Q. Are you prepared to say that that statement in the printed book is correct?

Mr. Root: Objected to as to form, as embodying a statement that is not correct.

A. That they were there, but that they were produced by Mr. Root I have no knowledge or recollection.

68. Q. Do you mean to refer us in this investigation to a record as containing verity when you have no opinion or knowledge that it is true?

940

A. My recollection is distinct that those papers were there at that time, and that they were shown to me when I was a witness, that is all.

69 Q. The record to which you refer is that which states that Mr. Root produced them, is it not?

A. That called my attention to the fact, and remembered it independently of the record.

70 Q. Well, that is the record, is it not, to which you referred just now?

A. I think so.

71 Q. There is not any other record of their production except by Mr. Root, is there?

A. Not that I know of.

72 Q. None known to you?

A. None known to me.

73 Q. And there is something in the record which indicates that Mr. Root produced them?

A. I did not know what the record was, I simply saw the printed case in Mr. Bishop's hand; I do not know what book he had.

74 Q. You regard that as consistent with the question which you answered five questions ago, do you?

A. You are asking me to state what I absolutely know?

75 Q. No.

A. It was stated that that was the record; all that I looked at was the printed page.

941

76 Q. Is the page to which you refer here in Conrt?

A. I do not know.

77 Q. What is the best description you can give of that paper now?

A. It was a printed book: it looked like a printed record of a law case.

78 Q. Mr. Ritch you are one of the defendants in this action, are you not?

A. I am.

79 Q. And you have interposed and answered denying the averments of the complaint?

A. Yes.

942

80 Q. In pursuance of your obligation to tell the truth, the whole truth and nothing but the truth, under the oath you have just taken, can you give no better answer in reference to the printed page to which you have just referred than that which you have given?

A. The only thing is that I saw that page and I did not see the book or anything except the open page.

81 Q. It was a page out of the air without any connection, was it?

A. It was a printed page in a book.

82 Q. In a book, and that led you to state that the will and four codicils were produced on that trial before Judge Truax; is that so?

A. That is not so; I stated from my independent recollection. I remembered they were produced on the trial.

83 Q. And your recollection was refreshed by a circumstance which, so far as you know, had no connection with the trial, is that what you say?

A. Either you or Mr. Bishop stated that that date was a year later than the date of my receipt, and I assumed that what you agreed upon was correct.

84 Q. You say that I stated any such thing?

A. Perhaps it was Mr. Bishop?

943

85 Q. Who was it that had the book, Mr. Bishop or I?

A. Mr. Bishop had the book.

86 Q. And I had it not, is not that right? Did you see me look at it?

A. I do not remember; there was a general acquiesance in the fact that that was a record of something, that was a year later than my receipt or the receipt of my firm.

87 Q. Then your independent recollection having been refreshed by this printed page which you are unable to give any better description of than what appears in your testimony, you are unable to remember who
944 produced the will and codicils at that time; is that what you say?

A. I am.

88 Q. You have no reason to think that that will and the codicils were produced by the counsel for the present complainants, have you?

A. I do not remember.

39 Q. You do not remember, you think that may be so, do you?

A. I should think not, only from the recollection of the sentence that was read that Mr. Root produced them.

90 Q. What sentence do you refer to, this printed page which you are unable to connect with any record or other description?

A. Yes, the sentence which Mr. Bishop read from that printed page is the only reason that I have for saying that I am of the opinion that Mr. Root produced it and not the counsel for the complainants here.

91 Q. You were entirely familiar with the course of that litigation were you not?

A. Yes.

945

92 Q. At what stage of the case was it that the will was, and the codicils were, thus produced on that trial?

A. I do not remember.

92 Q. Was it on the plaintiff's case or the defendant's?

A. I do not remember.

93 Q. You mean to say that you do not remember whether in an action brought to establish a secret trust and impose it on your conscience, where you sat there as a defendant in the case, and where Mr. Root was the counsel for the plaintiffs, that you do not remember whether the introduction of the will and the codicils into the testimony in the case came first from the plaintiffs or from the defendants; is that what you say?

946

A. I only remember that in the ordinary course of such trials they would naturally be produced by the plaintiff.

94 Q. But that does not refresh your memory as to whether that was the fact, does it?

A. I do not recall it.

95 Q. And you still adhere to your statement that you do not remember whether that will and those codicils came up on that record first from the plaintiffs or from the defendants, is that what you say?

A. It is an inference; my belief is that they were produced by the plaintiff, but I have no recollection.

96 Q. You have the independent recollection that they were produced on that trial, you have said it is so far refreshed by this paper that you remember it independently of the paper; have your not so testified?

A. I have so testified.

97 Q. And your memory stops there, does it, and you do not remember and you cannot now recall whether it was produced on the part of the plaintiffs or the defendants on that trial; is that what you say?

A. My best recollection would be that the plaintiffs produced it.

947

98 Q. Was not Mr. Root acting as counsel for the plaintiffs on that trial?

A. One of the counsel, Mr. Bishop another.

99 Q. Mr. Root was one of the active counsel in trying the case, was he not?

A. He was.

100 Q. You remember that very well, do you not?

A. Very well.

101 Q. Your memory has not been particularly impaired so far as you know since then, has it?

A. I think not.

102 Q. You consider that your memory is still in good condition, do you not?

A. In fair condition.

948

103 Q. Now in as much as this paper which you say was read by you to Mr. Bishop states together that the will was produced and the codicils, and that Mr. Root produced them, do you mean to say that now your memory is not refreshed quite as much that Mr. Root produced them as the bald fact that they were produced?

Mr. Root: Objected to as to form, as including a statement which is not correct. I do not think that the paper states anything of the sort.

A. I have no recollection whatever independent of that statement.

104 Q. (Handing book.) I show you the Court of Appeals' record on file in this Court, filed in this cause September 17, 1897, and I ask your attention to page 280 of the record, and I ask you to read that page.

Witness reads.

105 Q. Have you read that, Mr. Ritch?

A. I have.

106 Q. You observe that you were called as a witness immediately after the introduction of the will and codicils?

A. Yes.

949

107 Q. Now will you say whether, having looked at that record, your memory is refreshed as to the fact as to whether Mr. Root offered those papers in evidence?

A. I have no recollection independent of the record that he rather than Mr. Bishop or any one else offered the papers.

108 Q. The will and those codicils had previously been in your possession, had they not?

A. Between—before that?

109 Q. Previous to their having been offered in evidence in that case.

A. I think not.

110 Q. They had not previously been in your possession at all, you cannot mean that, Mr. Ritch.

A. I do mean it.

950

111 Q. Never previously been in your possession?

A. Certainly they had been in my possession, but between the time they were filed for probate in the Surrogate's Court and the time of that trial, I am quite sure that they were never in my possession.

112 Q. Do you mean in your personal possession, or in that of your firm?

A. Either personal possession or that of the firm.

113 Q Do you mean, then, to imply or impute that the receipt held by the Surrogate signed by your firm or signed by Mr. MacArthur for your firm is a forgery?

A. No, sir; it is a correct signature.

114 Q. The will and those codicils were offered in evidence on the trial before Judge Truax and you testified, as appears from the record, on January 24, 1894. Your receipt for the will and codicils is dated the 18th of April, 1893. Can you offer any explanation as to the whereabouts and custody of those papers in the meantime?

951

A. My recollection is quite distinct in this, as to this state of facts, that at the time of the trial before the Surrogate Mr. MacArthur acted as general custodian of the will and codicils and a very large number of exhibits, and that my impression is, I should say my best recollection is, that as soon as that trial was over everything was returned to the Surrogate's Court by Mr. MacArthur and that the will and codicils were there until they were produced on the succeeding trial. My impression is that when all those exhibits are found, which I have several times asked that they be looked up—

115 Q. You are not testifying about anything that I asked you about. Your answer will be stricken out. I did not ask you about your impression.

A. I am giving my belief as to the state of things, and I believe that the will and codicils are all together mislaid in the Surrogate's office.

952

Mr. Sherman: I move to strike out the answer as not responsive and as incompetent, irrelevant and immaterial, and I repeat the question.

116 Q. The will and those codicils were offered in evidence on the trial before Judge Truax and you testified as appears from the record, on January 24, 1894. Your receipt for the will and codicils is dated the 18th of April, 1893. Can you offer any explanation as to the whereabouts and custody of those papers in the meantime.

A. My explanation is and my belief that Mr. MacArthur as temporary custodian of all papers took the will and codicils back to the Surrogate's Court after the trial.

117 Q. And he, you say, is in Paris?

A. Yes.

118 Q. Do you intend to testify positively to that fact?

A. That is my best recollection.

119 Q. Have you a recollection of that fact?

A. Yes, I think I can say that I have quite a distinct recollection that that was the course of those papers.

953

120 Q. You observe that I have confined the matter inquired of to the period between April 18, 1893, and January 24, 1894?

A. Yes.

121 Q. You intend your answer, your last answer, to apply to that period of time, do you?

A. That period of time, and so far as the whereabouts of those papers are concerned, I intend that it shall apply to all the time since the Surrogate's trial except as they may have peen temporarily taken from the Surrogate's office.

954

122 Q. In giving this testimony you are under some pressure to conclude it as rapidly as possible and get back to your office, are you not?

A. I have arranged matters so that I can give the day if necessary.

123 Q. All right, Mr. Ritch, you understand that the integrity and production of this will and codicils is a matter which very much concerns your reputation?

A. I do not.

124 Q. You do not; you think that under a charge that you have furnished an abortive plan to evade the statute of wills which put it within your power to appropriate an estate of three millions to your own purposes,

where the Federal Court has decided that as against these complainants those questions have not been disposed of, and under a claim further that the codicil purporting to be executed on the 15th of November, 1890, under the probate of which in connection with the will you were enabled to get into your control an estate of about six millions of dollars, and where the claim is made that that codicil of November 15th was an act of violence upon Mr. Fayerweather, that his mind and probably his body never took any part in it, and that by a preceding codicil destroyed by one of your alleged co-ex-
955 ecutors and which was executed on the 11th day of November, 1890, the legal title to this fund may have been and was divested from you, and in the progress of an attempt of the complainants to substantiate that claim by proof, you being called upon as the last receiptor for the documents in question, it being essential to examine the original documents and to inquire into the evidence of forgery in the codicil of November 15th, 1899, you think that your reputation is not concerned in the production of those papers; is that what you mean to say?

A. I think the history of this case is so well known that my reputation is not particularly affected.

956

125 Q. And you think it is a matter of unconcern as far as you are affected, whether the complainants shall be enabled to subject the original codicil of November 15th, 1890, to any further inspection of experts or others, do you?

A. I would be very glad to produce those papers, I would be very glad to know where they are. I have spent hours myself, and my clerks have spent hours, in endeavoring to find them. They have been handled by a great many people who are not connected with my office.

126 Q. Where have you a distinct recollection that you last saw them?

A. When they were produced on that trial before Judge Truax.

127 Q. And that was subsequent to this receipt of April 18, 1893, necessarily?

A. Yes.

128 Q. But how Mr. Root got them to offer in evidence you do not know and have no recollection; is that correct?

A. It is entirely correct.

129 Q. And what became of them after that you have no knowledge or impression, except that you have an impression that Mr. MacArthur has taken them back to the Surrogate's office and that they have been mislaid there?

957

A. Not at that time; my testimony as to his custody of them relates entirely to the hearing before the Surrogate.

130 Q. That was prior to April 18th, 1893?

A. Yes.

131 Q. So that in taking your former testimony in the light of that statement Mr. MacArthur's occasion to return them to the Surrogate as the general custodian for all concerned was prior to the receipt given by him on behalf of your firm on the 18th of April, 1893; is that right?

958

A. That receipt must have been given at the time he took the papers.

Mr. Sherman: I move to strike the answer out as not responsive, and I repeat the question.

132 Q. (Question repeated.)

A. It would be subsequent to his giving the receipt.

133 Q. It was subsequent to his giving the receipt?

A. He received them first and returned them afterwards.

Mr. Sherman: I move to strike that answer out as not responsive, and I repeat the question.

134 Q. (Question repeated.)

A. No.

135 Q. Mr. Ritch, did you ever see Mr. Fayerweather's signature to the codicil of November 15, 1890?

A. His signature to the codicil?

Mr. Sherman: Never mind. I do not think I can go any further with Mr. Ritch until he brings those books here; I understand he will bring them here. When will it be agreeable to you, Mr. Root, to cross-examine the witnesses who have been already examined? When shall we go on again with Mr. Ritch? I shall be glad to consult your convenience as far as I can.

959

Mr. Root: Any time except Monday.

Adjourned to October 18, 1898 at 10.00 a. m.

New York, October 18, 1898.

Met pursuant to adjournment.

Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Root and Mr. Hume.

Continuation of the examination of *THOMAS G. RITCH.*

By Mr. Sherman:

960

136 Q. Are you now able to produce the will and the four probated codicils thereto of the late Daniel B. Fayerweather?

A. I am not.

137 Q. Mr. Ritch, on or about June 27, 1892, was there pending in the Surrogate's Court a matter of the partial settlement of the accounts of yourself and Messrs. Bulkley & Vaughan as executors of the estate of Daniel B. Fayerweather?

A. I think so. My general recollection is that something was pending all the time.

138 Q. And was that matter referred to Scott Lord as Referee?

A. There was one reference pending before him.

139 Q. And in the course of that reference did you adduce testimony in support of certain credits which you claimed upon that accounting?

A. I think so.

140 Q. And was one of those credits an item of $5,000 which you claim to have paid to the firm of Evarts, Choate & Beaman, as shown by the receipt formerly identified by you herein and offered in evidence?

A. I have no recollection as between one account and another. When is the time of which you speak? June 27th?

961

141 Q. That is what the record says, in the matter of the partial settlement of the account of Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, as executors of the estate of Daniel B. Fayerweather before Scott Lord, Esq., Referee, New York, June 27th, 1892.

A. I am quite sure that I was not present at that time, from the fact that the day before a daughter of mine died.

142 Q. Do you confine your answer to that date?

A. I had nothing personally to do with the first accounting during that time, as I recollect, because of that circumstance. If vouchers were filed or testimony taken, it was done by somebody else than myself.

962

143 Q. That proceeding before Scott Lord as referee continued down to and after October 5th, 1892, didn't it?

A. During all that time another daughter was exceedingly ill with two trained nurses in attendance and I do not think I had anything to do with that first accounting; the second daughter afterwards died.

Mr. Sherman: Solicitor for complainants moves to strike out the answer as not responsive.

144 Q. That proceeding before Scott Lord as Referee continued down to and after October 5th, 1892, didn't it?

A. I remember very little about that proceeding for the reason whichI have given.

Mr. Sherman: I move to strike out the answer as not responsive.

145 Q. That proceeding before Scott Lord as Referee continued down to and after October 5th, 1892, didn't it?

A. I do not remember anything about it except that there was that reference and I think I gave some testimony.

146 Q. Your partner, General Stewart L. Woodford, also gave some testimony, did he not?

A. I do not remember.

963

147 Q. Do you mean to say that you were not present when he gave his testimony, Mr. Ritch?

A. I do not remember being present.

148 Q. His evidence was not adduced by the complainants herein, was it?

A. I do not remember.

149 Q. Have you any reason to think that Emma S. Fayerweather or Mary W. Achter, called Mr. Woodford on that proceeding?

A. I have no reason to suppose that they did.

150 Q. You have every reason to suppose that they did not, have you not; and you know that they did not, do you not?

964

A. Yes, I will say that I know they did not, for the same reason only that I would know that a good many other people would have no reason for calling him as a witness.

Mr. Sherman: I move to strike out that part of the answer beginning "for the same reason" as impertinent and not responsive.

The Witness: I have no knowledge whether what witnesses were called by Mrs. Fayerweather or Mrs. Achter.

Mr. Sherman: There is no question pending, Mr. Ritch. I move to strike out that statement by the witness as impertinent and not responsive to any question;

and I ask the examiner to certify this examination to the Court in order that the Court may make suitable directions for the observance by the witness of the proper rules covering such examinations.

151 Q. Do not know whether Mr. Woodford was a witness in support of credits claimed by you on that accounting?

A. I do not remember; I only presume that he was.

152 Q. Don't you know that he was?

A. I do not.

965

153 Q. You know that you received credit in your accounts for that item of $5,000, as paid to Evarts, Choate & Beaman, do you not?

A. I think credits were given for all vouchers that were put in; I think that was put in one or the other of the first two accounts.

154 Q. You know that it was evidence given upon your part to sustain its correctness as a credit against the estate; do you not know that?

A. That is my best recollection.

155 Q. And you know that Mr. Woodford was one of those witnesses, do you not, to explain those items?

A. I do not.

156 Q. You do not know that?

A. No.

966

157 Q. Mr. Ritch, did you not at that accounting give evidence yourself in support of——

A. What accounting?

158 Q. Before Scott Lord, give evidence yourself in support of that item?

A. I gave testimony, but any answers to questions that were asked of me and what the questions were or what the answers were, I have no present recollection.

159 Q. Did you testify in substance that during the progress of the trial upon the objections to the probate before the Surrogate a member of the firm of Evarts, Choate & Beaman, being a witness before the Surrogate,

was threatened with imprisonment by the Surrogate for failure to answer some questions where he pleaded privilege of counsel; did you so testify.

A. I do not remember.

160 Q. Was that the fact?

A. What fact, that I did so testify, or the fact of what occurred before the Surrogate?

161 Q. The fact of what occurred before the Surrogate.

A. My recollection is that Mr. Butler was called as a witness, there was discussion as to his testimony, he declined to answer. What the disposition of the matter by the Surrogate was, I do not now remember; my best recollection is that the settlement of the matter left that undisposed of; I may be mistaken.

967

Mr. Sherman: Solicitor for the complainants moves to strike out that part of the answer commencing "what the disposition of the matter by the Surrogate was" as not responsive.

162 Q. Do you remember that an adjournment was taken so that Mr. Butler might consult counsel in regard to his duty and that as you understood he advised with Mr. Joseph H. Choate, and when the case came on again Mr. Choate was in Court prepared, as he told you, or that he had examined the matter and was prepared to argue the question of privilege and oppose the disclosure by Mr. Butler, or that in substance?

968

A. My best recollection is that the adjournment was taken to consult counsel, I do not remember being present when Mr. Choate argued the matter.

Mr. Sherman: I move to strike out that part of the answer commencing "I do not remember being present," as not responsive.

163 Q. Do you remember that an adjournment was taken so that Mr. Butler might consult counsel with regard to his duty and that as you understood he advised with Mr. Joseph Choate, and when the case came on

again Mr. Choate was in Court prepared, as he told you, or that he had examined the matter and was prepared to argue the question of privilege and oppose the disclosure by Mr. Butler, or that in substance?

A. I do not remember hearing any argument by Mr. Choate.

Mr. Sherman: I move to strike out the answer as not responsive.

969

164 Q. Do you remember that an adjournment was taken so that Mr. Butler might consult counsel with regard to his duty and that as you understood he advised with Mr. Joseph H. Choate, and when the case came on again Mr. Choate was in Court prepared, as he told you, or that he examined the matter and was prepared to argue the question of privilege and oppose the disclosure by Mr. Butler, or that in substance?

A. I am quite sure I was not in Court and I have no personal knowledge of what Mr. Choate did.

Mr. Sherman: I move to strike the answer out as not responsive.

165 Q. Do you remember that an adjournment was taken so that Mr. Butler might consult counsel with regard to his duty, and that as you understood he advised with Mr. Joseph H. Choate, and when the case came on again Mr. Choate was in Court prepared, as he told you, or that he examined the matter and was prepared to argue the question of privilege and oppose the disclosure by Mr. Butler, or that in substance?

970

A. I do not remember anything beyond the—I do not know anything beyond the fact that the adjournment was taken to enable Mr. Butler to consult with counsel; I understood that counsel was Mr. Choate; and I am quite sure that the next day when the matter came up I was not present, had no conversation with Mr. Choate about the matter, and do not now recall what argument he made or where he made it.

Mr. Sherman: I move to strike out the answer as not responsive, commencing with the words "I am not sure."

166 Q. Do you remember that an adjournment was taken so that Mr. Butler might consult counsel with regard to his duty and that as you understood he advised with Mr. Joseph H. Choate, and when the case came on again Mr. Choate was in Court prepared, as he told you, or that he examined the matter and was prepared to argue the question of privilege and oppose the disclosure by Mr. Butler or that in substance?

A. I have not any other answer to give.

971

167 Q. Do you mean that you cannot remember the matters inquired of with more particularity than you have stated?

A. I have given my best recollectiou.

168 Q. Have you given all of your best recollection or only part of it?

A. Pertinent to your question, yes.

Mr. Sherman: I move to strike the answer "pertinent to your question" as not responsive.

169 Q. Was that item of $5,000, paid to Evarts, Choate & Beaman in part for that service, or such service as is embodied in my question, and did you claim it for that service as a credit to you?

972

A. $5,000 was paid to Evarts, Choate & Beaman for such services as they rendered.

170 Q. Did the service which they rendered and for which that was paid include the preparation or the readiness of Mr. Choate to oppose the disclosure by his partner, Mr. Butler, of the codicil, of the contents of the burnt codicil?

A. I think what Mr. Choate did was an element in that bill; I do not remember the items now.

171 Q. Have you not yourself testified in support of that item that such service was included in the payment or $5,000, to Mr. Choate's firm?

A. I do not remember.

172 Q. You do not remember anything to the contrary, do you?

A. I do not.

173 Q. Did you understand when, as executor of the last will and testament of Daniel B. Fayerweather, you paid $5,000 to Evarts, Choate & Beaman, that the sum was paid in part to employ Mr. Choate to resist the disclosure by Mr. Butler of the contents of the burnt codicil, so called?

973

A. I remember that Mr. Choate's services in connection with Mr. Butler's connection with the matter before the Surrogate, I remember that was an element in the bill.

174 Q. Do you remember any other service that Mr. Choate rendered or prepared himself to render before the Surrogate, except to resist the disclosure by his partner Mr. Butler of the contents of the burnt codicil?

A. I do not.

175 Q. So far as you know, was not that the only service rendered by Mr. Choate in that connection?

A. It was just as probable there was other service as that there was not. I signed the check for the bill because counsel for the three executors approved it. I only remember the fact that that bill was paid. What its form was or what the items were I do not remember.

974

Mr. Sherman: I move to strike out the first sentence of the answer as not responsive and as hypothetical and conjectural and as not evidence.

176 Q. But your firm took upon it the active conduct of the litigation on the part of the probate of the will, did it not?

A. It did.

177 Q. Did your partner, Mr. Arnoux, before the witnesses attesting the codicil of November 15th, 1890, were

put upon the stand, drill the witnesses and instruct them in the testimony they should give?

A. What is that?

178 Q. Did your partner, Mr. Arnoux, before the witnesses attesting the codicil of November 15th, 1890, were put upon the stand, drill the witnesses and instruct them in the testimony they should give?

A. I have no knowledge that he did, or intimation that he did.

179 Q. Were you present before Scott Lord as referee when Judge Arnoux testified to the items claimed as credit by your firm for legal services?

A. I have no recollection.

975

180 Q. Will you say that you were not?

A. I presume that I was not, for I was present very little of the time.

Mr. Sherman: I move to strike out the answer as not responsive.

181 Q. Will you say that you were not present?

A. I do not remember.

182 Q. You know the fact, do you not, that your firm of Arnoux, Ritch & Woodford, made claims against this estate through you as executor and the other executors for services performed in reference to the probate of the will?

A. They did.

976

183 Q. They were allowed considerable sums for that, were they not?

A. I believe so.

184 Q. Do you remember how much?

A. I do not.

185 Q. Were you furnished with a transcript of the stenographer's notes of that testimony as it proceeded?

A. When?

186 Q. As it proceeded?

A. I do not remember.

187 Q. Have you not claimed and received credit as disbursements for those transcripts in your accounts as executors?

A. Claimed credits for the disbursements which were made, and I believe they were paid, and stenographer's bills were a considerable item.

Mr. Sherman: I move to strike the answer out as not responsive.

188 Q. Have you not claimed and received credit as disbursements for those transcripts in your accounts as executors?

A. The minutes were not furnished to me.

977

Mr. Sherman: I move to strike the answer out as not responsive.

189 Q. Have you not claimed and received credit as disbursements for those transcripts in your accounts as executors?

A. I do not remember.

190 Q. Do you remember Judge Arnoux's testifying in support of the claims of your firm in substance, that prior to the witnesses to the codicil of November 15th being put on the stand he rehearsed the testimony, that he put them various questions, assuming the positions of the various assumed contestants, endeavored to ascertain what line of attack upon their testimony would be adopted, and drilled them as to what their answers should be, and instructed them in what manner to meet the anticipated attack?

978

A. I do not remember any such testimony.

191 Q. If he so testified and if that were done, was it done with your assent and authority?

Mr. Root: I have a special objection to that as to form, as hypothetical, and involving a hypothesis and an assumption that is not true.

A. I decline to answer such a question as that.

192 Q. Upon what ground do you decline to answer, on the ground that it will incriminate you?

A. On the ground of its extreme irrelevance and its impertinence.

Mr. Sherman: I move the examiner to certify the record of the Court. That is all with Mr. Ritch until this question is disposed of. Solicitor for complainants now tenders the witness Mrs. Goodwin for cross-examination.

Mr. Root: Solicitor for defendant, Trustees of Hamilton College, declines to cross-examine, saying that no part of the testimony of this witness has anything to do with the issues joined.

979

Mr. Sherman: Solicitor for the complainants asks for an adjournment of the taking of depositions until 2.30 p. m.

Mr. Root: I have to be in the Appellate Division at that time.

Mr. Sherman: What is the next day on which it will be convenient for you to proceed?

Mr. Root: Thursday.

Adjourned to October 20th, 1898, 2.30 p. m.

THOS. G. RITCH.

Sworn to before me this
17th day of April, 1899.
John A. Shields, Examiner.

980

New York, October 20th, 1898.

Met pursuant to adjournment.

Present: The Examiner, Mr. Sherman, Mr. Root, Mr. Blakie and Mr. Hume.

Continuation of the direct-examination of *MAUS R. VEDDER*:

By Mr. Sherman:

135 Q. You have stated your opinion of the competency or condition of Mr. Fayerweather on the Friday before and on the Saturday of his death—

A. That is the 14th and the 15th?

136 Q. That would be the 14th and the 15th, not the 11th, but the 14th and the 15th.

137 Q. And objection has been made that you have not disclosed the facts or symptoms upon which your opinion was based. I now ask you to state fully the symptoms and condition of Mr. Fayerweather as they were apparent to the eye and touch on the morning of the day of his death and on the night before, upon which yon base your opinion already expressed regarding his competency and his physical and mental condition?

981

A. Well, on the day of his death, at the time that I made the noon visit, which was the most important one, his symptoms were, his heart for example was not sufficiently strong to propel the blood to the extremities, and in consequence thereof his extremities were cold; his respiration on that day was rapid and shallow, it was not sufficient to oxygenate the blood, and in consequence his color was rather inclined to blue, owing to the retention of the carbonic acid gas that was in his system; his kidneys had ceased action, he could not pass any water; his digestion had comparatively ceased as I stopped all medicine and food and gave directions to only give him water; those were the symptoms present on the day of his death at about 12 o'clock, that I based my opinion on those symptoms.

982

Mr. Sherman: Complainants tender the witness for cross-examination.

Mr. Root: Counsel for the trustees of Hamilton College says that for the reason that this testimony has no relation whatever to the issues joined, he declines to cross examine.

Mr. Sherman: The clerk from the Surrogate's Court is not able to get here, and I will call Mr. Blaikie to

prove the record which I expected to have the Surrogate's clerk prove.

MAUS R. VEDDER.

Sworn to before me this 2d day of March, 1899.

JOHN A. SHIELDS, *Examiner.*

WILLIAM BLAIKIE, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

983

Direct examination by Mr. Sherman:

1 Q. You were the attorney for certain parties in the Surrogate's Court in a proceeding entitled, In the matter of the partial settlement of the account of Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan, executors of the estate of Daniel B. Fayerweather, deceased, which went to a reference before Scott Lord, Esq., commencing June 27th, 1892, were you not?

A. Yes.

2 Q. Did you have furnished to you from time to time, as the case proceeded, the stenographer's transcript of the minutes of the testimony so taken?

A. Yes.

984

3 Q. And was that testimony filed in that proceeding in the Surrogate's Court in connection with the accounting?

A. I believe it was; I am practically sure that it was.

4 Q. Have you here carbon copies or duplicates of the record so filed?

A. I have parts of them; all that you have there.

5 Q. Have you duplicate carbon copies of the original of the testimony of Thomas G. Ritch, Stewart L. Woodford and William Henry Arnoux?

A. Yes, sir.

6 Q. (Handing papers) Are these the papers referred to?

A. Yes, sir.

7 Q. Did you hear the testimony therein reported given?

A. I did.

8 Q. Did you receive those copies in due course shortly after it was taken and written out?

A. Yes, I did.

985

9 Q. About what time elapsed between the giving of the testimony and your receipt of those minutes from time to time?

A. Well, not over three or four days I should say.

10 Q. When you received the minutes had you still in your memory the testimony which had been given?

A. Oh, clearly.

11 Q. Are you able to say whether those transcripts as received by you and now produced correctly recited the testimony as you heard it given?

A. They did.

12 Q. Now I ask you to turn to that part of the minutes which contains the testimony, if any, of Stewart L. Woodford on the subject of a fee of $5,000 paid to Evarts, Choate & Beaman, and state at what pages of the record it is found?

986

A. Upon page 61 it began and ran through page 66.

13 Q. Are the questions numbered?

A. They are not.

14 Q. Have you an independent recollection of the testimony so given without any aid from the transcript?

A. Of the substance, not of the words.

15 Q. Can you state the questions and answers without reference to the transcript?

A. No, I cannot.

16 Q. I will ask you to read from that record the questions and answers on that subject in the testimony of General Woodford?

A. I asked Gen. Woodford at page 61: "Q. Do you know, Governor, at what time in this proceeding Messrs. Evarts, Choate & Beaman first became connected with it as attorneys and counsel?"

17 Q. With it?

A. Yes, with this proceeding. Then the answer was given to me. "A. I have been informed that they rendered service to Mr. Fayerweather before his
987 decease. I know that during the progress of the trial a member of that firm, being a witness before the Surrogate, was threatened with imprisonment by the Surrogate for failure to answer some questions where he pleaded privilege of counsel." Now shall I read the objections and the referee's words, and so on?

18 Q. No, read the question and answers.

A. The next question—"The Referee: Did he plead it" "The Witness: He pleaded it." "The Witness (continuing): And at that time there was, if I remember, an adjournment of the case, and Mr. Evarts' firm gave advice in connection with the matter of the examination of one of their number." I then asked a question: "Q. What services did that firm render Mr. Fayerweather prior to his decease that you refer to in your answer?"

988

"A. I think that I have been told that they drew and advised with him—whether they drew a codicil they advised with him as to the matter. Q. Do you know when that was? A. I think it was within a few days or a short time before his decease. Q. Do you know what that codicil stated? A. I do not. Q. Did you ever see it? A. No, sir. Q. Know what became of it? A. I do not know. Q. What? A. I do not know. Q. Don't know what was in it? A. No, sir; I have heard, but I don't know. Q. You have heard? A. I don't now recall; it is in that book, printed book, before the Surrogate, in the 900 pages. Q. Do you recall any

part of what you heard was in that codicil? A. No, I don't recollect about it. Q. You swear you don't know? A. Not accurately enough to state. Q. State as accurately as you can."

That was not answered.

"Q. Have you no idea what was in that codicil? A. Strange as it may seem I cannot recall it. Q. Do you know when the services of Messrs. Evarts, Choate & Beaman began in the proceedings—what stage of them? A. About the time when one of their number was called as a witness in the case. Q. Was that early or late in the proceeding, Governor? A. I should say it was in the latter half.

989 Q. Did they take an active part in endeavoring to uphold the will in that contest? A. I don't think they took any part in upholding or rejecting the will. Q. Your counsel has asked you here in regard to a charge of theirs for $5,000, what was that for? A. For such services as they rendered prior to Mr. Fayerweather's death, and for the services that they rendered in connection with the testimony given by one of their firm on the hearing before the Surrogate. Q. Please to detail as fully as you can what services they rendered in connection with the services of one of their firm in the hearing before the Surrogate? A. One of their number was— Q. What was his name? Mr. Parsons: But-
990 ler. Q. Prescott Hall Butler? A. I do not recall the gentleman's name. The younger Mr. Butler was put upon the stand and questioned with regard to some codicil that was alleged to have been made by Mr. Fayerweather before his death. Mr. Butler, in the course of that examination pleaded his professional privilege. The Surrogate threatened him with imprisonment. An adjournment was taken so that Mr. Butler might consult counsel with regard to his duty, and I understood that he advised with Mr Joseph H. Choate, and when the case came on again Mr. Choate was in Court, prepared, as he told me, or that he

had examined the matter and was prepared to argue this question of professional privilege that had been raised by Mr. Butler. Q. Did either Mr. Evarts, Choate or Mr. Beaman, Mr. Butler, Mr. Allan Evarts, I believe they comprise the members of that firm, did either of them take any active part in the proceedings looking to the probate of this will other than you have described just now? A. No, sir; not to my knowledge. Q. How much of their bill covers labor or services rendered prior to the death of D. B. Fayerweather? A. I don't know what distribution they made. Q. Give me an impression of how they cut it? A. My impression is
991 that they were also consulted between Mr. Fayerweather's death and the contest in regard to the will. That just now occurs to me, by Messrs. Bulkley and Mr. Vaughan, I think. Q. Then these services that you have detailed of Messrs. Evarts, Choate & Beaman were the ones which constituted the whole of their services, so far as you know, in connection with the probate of this will? A. With the matter that I have just added, that I understood that that firm was consulted by Messrs. Bulkley and Vaughan after Mr. Fayerweather's death and prior to the contest—prior to the trial before the Surrogate. Q. Do you know on what question or questions? A. I could only answer from hearsay. Q.
992 Well, state that, sir. A. I have heard that the will and codicils were submitted to them by Mr. Vaughan. Q. To Evarts, Choate and Beaman? A. To Evarts, Choate & Beaman. Q. At what time? A. After Mr. Fayerweather's death and before the trial in the Surrogate's Court. Q. With what end in view, or purpose? A. I suppose with the view of retaining them or employing them. Q. Your testimony has been, if I recall it right, that the bill of Evarts, Choate & Beaman was to cover services prior to the death of the testator, as well as those after. A. Yes, I understood that that bill of $5,000, covered all the professional services they at any time rendered, either to Mr. Fayerweather or to his estate. Q. They state they were consulted and advised

concerning and as to affecting the probate of the will and settlement of the estate. I understood you to say it covered items of services rendered by them prior to the death of the deceased? A. I do. I understood that that was their entire bill against Mr. Fayerweather and against his estate and against his executors. Q. You don't know what they rendered for it, any more than you have detailed here? A. No. Q. They took no active part in the contest? A. No, sir. Q. Did you ever approve of this disbursement to them, $5,000, or to that firm? A. I do not think that bill was ever submitted to us."

That is all.

993

Mr. Sherman: I ask to have the pages from which the witness has read marked for identification.

The pages were marked Complainants' Exhibit 1 for identification, October 20th, 1898, C. B.

19 Q. Have you there the record of the testimony given by William Henry Arnoux upon that accounting in behalf of the executors?

A. I have it.

20 Q. At what page of the record does it begin, and what was the date when it was given?

A. Page 291; December 14th, 1892.

994

21 Q. Are you able to give the questions and answers of that testimony without reference to the transcript of the notes?

A. No, sir.

22 Q. Does the transcript which you hold in your hand correctly state the testimony as it was given in your hearing?

A. Yes, sir.

23 Q. I will ask you to read from that testimony so much as relates to the preparation of witnesses for the will contest?

A. Page 277, my question to Judge Arnoux:

"Q. A bill has been rendered here stating that the executors paid Arnoux, Ritch & Woodford $50,000 for their services in that matter. I have tried to get at what the services were with very meagre results. There was frequent reference in the answers of Gen. Woodford that you did part of the work, and I believe you had a great deal to do with it, and I would like to have you inform the referee what was done by Arnoux, Ritch & Woodford to earn that $50,000."

After an answer of some length upon other matters than you have asked me about, he continues in this long answer on page 279 thus:

995

"I took the active part of the care of the case. I was consulted by Mr. Bulkley and Mr. Vaughan and Mr. Ritch, the three executors, and by Mr. Myrick in some matters, and I prepared the work of the examination of the witnesses; I required each of the several witnesses to the will and the codicils that were then within my control or reach to give me a statement of the facts in connection with the factum of the instruments which they witnessed. I had them afterwards reduce them to writing; I had them again, under the direction of one of our young men in the office, examined, and that examination was re-

duced to writing, and after that I called them into my
996 room to go over their examinations and to compare them with one another, so that every witness should be thoroughly refreshed in his recollection as to whatever had been done or said in connection with the execution of the several instruments that they witnessed. I also made a motion for a bill of particulars on the part of these parties to show when, how and by whom Mr. Fayerweather had been unduly influenced and when he was out of his proper mind and unfit to execute the will, and how long it lasted. That was heard by the Surrogate. I presented a brief showing the English practice in that regard. The Surrogate said at first that he thought he had no power to grant the motion, but on considering the authorities, he said he did have the power, but that he would not exe-

cute it in this case. So he denied the motion. And there were other matters. After the litigation became intense and serious, Mr. Bulkley and Mr. Vaughan, in conference with Mr. Ritch and with me partly, and afterwards with me alone, concluded that it would not be wise to leave the entire burden of that litigation (that is what was said to me) in the hands of any one counsel; and they consulted me in regard to the counsel they should select, naming two or three of the most accomplished members of our bar, and among them Mr. John E. Parsons, and upon him their choice eventually fell. The action was con-
997 ducted in the trial throughout by Mr. Parsons and myself, with the exception of a very few questions as to matters that were brought up by counsel. I examined all the witnesses that we had to the will and codicils, I think, with the exception of Miss Beardsley, and it might be possibly the doctors, and they were cross-examined by Rollins. Mr. Coudert, when the proponents rested their case, arose and made a motion to dismiss the petition for probate, admitting that it was an unusual proceeding for the Surrogate to grant; but urging in this particular case he thought it should be granted. I answered the argument of Mr. Coudert and was followed by Mr. Parsons, and the result was on my motion that the will itself was admitted to probate, and thereupon Mr. Ritch and Mr. Bulkley, who were the two executors named—" Then there is a page missing. Page 288.

998

"Q. General Woodford gave us to understand that there was a very marvellous organization or arrangement in that office.

A. I believe so: I don't believe there is an office in the city that has a better arrangement.

Q. That being so, I judge the books would show what the firm did for the work which you claim this compensation for?

A. I think they would state substantially what every one did in the office but myself. They would not state, however, all that I did. For instance, a great many

nights during that time I would carry papers home and work all the evening through; and I doubt very much whether I ever told anybody in the office or gave anybody in the office an account of how I had used the time that I had spent in the evening. The same as in this present matter, there is this suit that is now pending. I did not keep an account of those evenings that I spent on that work.

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24 Q. I do not mean to interrupt you, but the object of the question is to call for such testimony as was given by William Henry Arnoux on the subject of preparation of witnesses for the Surrogate's contest. Please continue and indicate the testimony, if there be more on that subject, and read it. A. On page 291 the next reference to that subject begins with these words from Judge Arnoux:

"I then said, 'now, the first thing I want to do is to understand about these witnesses.' I called them one at a time into my room and I examined them and went through the matter with each one just as if it was in Court. Q. You have gone into that. A. You want it more in detail, and I am going to tell you more in detail. I acted as if I was both the direct and cross-examining counsel, and I took them up and went over it all. Then when I got through with it, I said to them, 'Now, I want
1000 each one to write down your own examination in your own way,' and when that was finished I brought, for instance Mr. Grout and Mr. Browning together in my room, and I said, 'One of you testifies that this codicil was executed at about such an hour, and the other one testified that he does not remember exactly the hour. Now,' I said, 'can you bring to one another's mind about the time? and Mr. Browning said, 'I recollect distinctly. I can fix the time because there was a clock at the head of the stairs, or on the landing of the stairs, and as I either went up or downstairs (I don't remember now which he said) I turned around and looked at that clock, and it was just such a time, so many minutes after two o'clock, if I recollect it

right. Q. Was he then on the way down stairs after the execution of the last codicil? A. I don't remember whether it was going to or from Mr. Fayerweather's room, but it was at that time. He told me which it was, and I am only showing you how careful I was about it; and Mr. Grout said, I did not look at the clock, but I do remember some circumstances which occurred, which led him to acquiesce in the exact time. Now the result of that examination was this, if I may say it, the Surrogate said that Mr. Grout had been the finest witness he had ever seen in his life in any litigation either before him as
1001 Surrogate or anywhere else, because he knew the facts and was able to account for every minute. Q. And because he was so well coached? A. Because he was so well coached, and you can recognize as a lawyer that it occupied a great deal of time. I was exceedingly careful in the course of that litigation. There was no hesitation on the part of the witnesses in telling what had been done by them in regard to the codicils. Those of them that knew could tell the room they were in, the persons that were present, the place where the papers were signed or anything about it; or they could tell right away that they did not recollect. There was no hesitancy on the part of any one of the witnesses in regard to what they had done. Q. Those were six gentlemen. Do you recall
1002 any others? A. I think I am doing well in naming six out of the number without looking at the record, but if you will let me take the record I can tell you who they were. Q. I have not got it with me to-day. I did not know I would need it to-day, and did not bring it over. There was a man named Butcher, was there not? A. Yes, Butcher was a witness, and I followed the same course with Butcher. Butcher is one of our managing clerks, and he has charge of the common law branch of the office, and I did so with Butcher."

Judge Arnoux continues:

"The witnesses to the will whom I examined as to that were Haley Fiske, Bradford W. Hitchcock and Charles L. Foster. Those to the first codicil were Stewart L.

Woodford, Bradford W. Hitchcock and Charles L. Foster. I made every examination in each of those entirely separate, just as much as though they did not belong to the same thing, and I required them to make their statements separately. Q. They were executed at different dates, weren't they? A. Different years, some of them. I had each of those put in a separate envelope so that one envelope had witnesses to the will, and the next envelope witnesses to the first codicil, and the next envelope witnesses to the second codicil, etc. Haley Fiske and Charles L. Foster and David F. Butcher were witnesses to the second codicil, and those I examined
1003 as to that. The next witnesses were to the third codicil, and none of those did I examine—the two doctors and Miss Beardsley; but the witnesses to the last codicil I examined, Mr. Browning and Mr. Grout, but I did not examine Miss Joyce. Q. You have covered them all? A. I did better than I thought for in my recollection. I named everybody but Butcher. I have not finished. You want some more of the details? The next work I did was for this bill of particulars, and on that I presented a brief."

That is all I think, sir, about the witnesses in his examination.

1004

Mr. Sherman: Now I ask to have the pages which the witness has used marked for identification.

The pages were marked Complainants' Exhibit 2 for identification, October 20, 1899, C. B.

25 Q. Have you in your hand the transcript of the testimony given by Mr. Ritch on that accounting? A. I have.

26 Q. Are you able to give the questions and answers without the use of the transcript? A. No, sir.

27 Q. Are you able to say whether that transcript of the record states the testimony as you heard it given by him? A. Yes, sir; it does.

28 Q. Now give the page and the dates of the giving of the testimony, and give the questions and answers by Mr. Ritch relating to the subject of the payment of $5,090, to Messrs. Evarts, Choate and Beaman? A. October 25th, 1892; I asked Mr. Ritch question appearing upon page 207 of the transcript thus:

"Q. There has been a bill of $5,000 to the firm of Evarts, Choate & Beaman, do you know what the services were for which the bill of $5,000 was paid? A. While I was perfectly willing to approve the bill, I will say in fact that I did not know of its payment until after it was
1005 paid. In fact, I did not know the amount of the bill until after it was paid. Q. But you knew they had rendered certain services to the executors? A. Yes, sir; I knew they had rendered certain services to the executor. Q. Please state what those services were. A. There were consultations between me—this is mere hearsay—I know in that way Mr. Vaughan— Q. You don't know what those services were? A. No, sir. Q. State the hearsay. A. Except in connection with advice to Mr. Vaughan and advice to Mr. Bulkley, now I recall the facts; Mr. Butler was a witness on the stand, and the question of his privilege was involved, and it was a very serious question for Mr. Butler, namely, whether he could professionally answer questions and disclose what had
1006 passed between him and his clients. That was the question that was involved, and it was a matter of serious consideration—that I know about. Q. You know about that? A. Yes. Q. Who was his client? A. Mr. Fayerweather was the client in whose interest the question came up. Q. Did Mr. Fayerweather consult him about any matter that this bill is charged for, in whole or in part? A. I have never seen the bill, and I dont know in what form it is made up. Mr. Vaughan, as an executor and having charge of the interests of the estate, I know, consulted Mr. Butler, and I know from hearsay that he consulted Mr. Cleveland and Mr. Choate. Q. Were these consultations before the death of Mr. Fayerweather? A. I don't know. Q. Do you know that they

were not? A. I do not—that is, what are charged for in that bill. Q. Do you know that any part of what was charged for in this bill is the drawing of a codicil to Mr. Fayerweather's will by Evarts, Choate & Beaman? A. I don't know. Q. This advice of Evarts, Choate & Beaman to Mr. Butler as to his rights as a witness under the section in regard to privilege, you say, that formed a part of this charge, do you—and that the services so rendered to Mr. Butler formed a part of this charge? A. I don't know how it is made up, but I know that that service was rendered, and it is quite possible it is in that bill.

1007

Q. This bill reads "To consultations and advice concerning matters affecting probate of will and settlement of estate, $5,000.' A. Then it does not form part of it. Q. You are an executor and you paid out $5,000. Now do you know what you paid it for? A. I did not pay it. Q. You executors know you paid it—you approved of it didn't you—you approved of the payment? A. As a matter of fact I can say that I approve of it now, but I did not before its payment. I had entire confidence, however, in Mr. Bulkley and Mr. Vaughan that they would not pay that $5,000 without knowing whether it was a proper payment to make. They had special know-

1008 ledge of the services which I did not have. Q. Did you know that at the time Mr. Butler was in doubt whether he should testify or not, that he had already the consent of his client that he might testify? Q. Do you know any more than you have already stated as to what was rendered for these $5,000, which you have assented to the payment of? A. I don't recall anything more now."

That is all.

Mr. Sherman: I ask that the pages which the witness has used be marked for identification.

The pages were marked Complainant's' Exhibit 3 for identification, October 20th, 1898, C. B.

29 Q. Do not know whether the testimony which you

have repeated in the form of originals of which the transcript are carbon copies were filed in the Surrogate's office and made a part a basis of action by the Surrogate in that accounting?

A. My entire belief is they were; I do not positively know; I have a very strong impression of seeing the original testimony in the Surrogate's office at different times.

30 Q. What was that proceeding?

A. It was the first accounting of the executors of Daniel B. Fayerweather.

1009

31 Q. And was this testimony which you have repeated adduced on behalf of the executors to secure credits in that account?

A. Partly for that, yes.

Mr. Sherman: That is all. I tender the witness for cross-examination.

Mr. Hume: I decline to cross-examine, on the ground that the testimony is not relevant to the issues.

Adjourned to October 25th, 1898, at 2.30 p. m.

New York, October 25th, 1898.

Met pursuant to adjournment.

Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Root, Mr. Hume and Mr. Choate.

1010

Continuation of the examination of *PRESCOTT HALL BUTLER*:

By Mr. Sherman:

256 Q. Mr. Butler, I invite your attention to the decision of the U. S. Circuit Judge upon your objections to make answers and questions upon the last session which you attended, page 170 of the examiner's minutes, and I will ask you to please read that order therein contained.

A. I have read it.

257 Q. Was a paper prepared by you as counsel in fact signed by Daniel B. Fayerweather in the presence of

attesting witnesses in the form and manner to constitute a valid publication of said paper as a testamentary document?

A. A paper drawn by me as counsel for Mr. Fayerweather was executed by him before witnesses and declared by him to be a codicil to his last will and testament in the presence of the witnesses who signed as such witnesses at his request after such declaration.

258 Q. Do you mean that they did so in the form and manner to constitute a valid publication of said paper as a testamentary document?

1011

A. I do not understand that a paper is a testamentary document until after the decease of the person executing it.

259 Q. Well, so far as a man can make a valid publication of a paper which may become a testamentary document after his decease, was that attestation of this paper in question in such form and manner as to constitute such a valid publication?

A. Not as I understand the word publication, no.

260 Q. Do you understand that a man may make a publication of his will prior to his decease?

A. I do not understand what the meaning of the word publication in that connection is.

1012

Mr. Sherman: I move the examiner to certify the further examination of this witness to the Court, in order that the Court may instruct the witness as to the meaning of the Court in the order which it has made.

The Witness: I have stated, Mr. Sherman, what the facts were, that Mr. Fayerweather signed the paper and declared it to be a codicil to his last will and testament in the presence of witnesses and requested them to sign as such and thereupon they did.

261 Q. And thereupon you left it in his custody, did you not?

A. I did.

262 Q. And went away?
A. I did.
263 Q. And you have never seen it since?
A. I have.
264 Q. Do you know the contents of that paper?
A. I believe that I do.
265 Q. I ask you to state the contents of that paper.

Mr. Choate: Before answering that I should like to ask Mr. Butler a question.

Mr. Sherman: I object to that. Mr. Butler is a witness and the record is in the hands of the parties.

1013

The Examiner: The witness is with Mr. Sherman now.

Mr. Root: May I not ask a question which will determine the admissibility of the evidence when it comes before the Court?

Mr. Sherman: I object to any interpolation now.

Mr. Root: I will put this question.

Mr. Sherman: I object to the question being taken; the witness is with me. It is entirely irregular to interrupt the examination in that way.

The Examiner: You may make a statement there that you want to ask a question, and I will rule upon it.

1014

Mr. Root: I request the examiner to permit me to ask Mr. Butler now whether Mr. Fayerweather communicated the contents of the instrument signed by him, as the witness has testified to the witnesses or to any one else upon the occasion to which his testimony refers.

Mr. Sherman: I object to that. The examiner rules that the objection of Mr. Sherman is valid, the witness being on direct-examination, the counsel for defendant has no right to ask the question at this stage.

Mr. Choate: Then the witness answers that under advice, and for the purpose of getting the decision of the Circuit Court of Appeals upon the question of privilege arising, and because of such privilege he declines to answer; and further states that upon the occasion referred

to in his preceding answer Mr. Fayerweather made no communication to the witnesses or either of them as to the contents of the instrument or any part thereof.

Mr. Sherman: I ask the examiner to state on the record in advance of this answer the fact that it was uttered by the lips of Mr. Choate, as the fact is.

The examiner states that he will so state.

Mr. Sherman: Now I move to strike out all the statement following the refusal to answer, on the ground that Mr. Choate is not a witness under oath and cannot depose to these matters in lieu of the witness; and I ask the examiner to certify the refusal of the witness to answer forthwith to the Court.

1015

The examiner states that he will so certify.

The Witness: I will, Mr. Sherman, in answer to your question, state—

Mr. Sherman: I object to any further answer to the question; I have had a refusal to answer.

PRESCOTT HALL BUTLER

Sworn to before me this 6th day of March, 1899.

JOHN A. SHIELDS,
Examiner.

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Parties counsel and the said witness, thereupon went before the Court, and the counsel for the complainants moved the Court upon the foregoing record that the witness Prescott Hall Butler be committed to the custody of the Marshal, and retained in custody until he should have purged the contempt committed by his refusal to answer the question by making answer to the same, whereupon

The Court Adjudges, That the said refusal is a wilful contempt of this Court, and that the same tends to impede, prejudice and impair the rights of the complainants herein; and thereupon orders and adjudges the said witness, Prescott Hall Butler, be and he is hereby committed to the custody of William Henkel, Marshal of the

United States for the Southern District of New York, and that he be confined in his custody until he shall purge the said contempt by making answer to said questions by stating the contents of the paper therein referred to.

And it is Further Ordered, That a transcript of this order attested by the Clerk of this Court under his seal shall be due and sufficient warrant to said Marshal for taking and retaining the said Prescott Hall Butler as aforesaid.

Adjourned to October 31st, 1898, at 2 p. m.

1017

New York, October 31st, 1898.

Adjourned by consent to November 10th, 1898.

New York, November 10th, 1898.

Met pursuant to adjournment.

Present: The Examiner, Mr. Blaikie, Mr. Sherman and Mr. Hume.

On application of Mr. Blaikie adjourned to November 17th, 1898, at 2 p.m.

New York, November 17th, 1898.

Met pursuant to adjournment.

Present: The Examiner, Mr. Blaikie, Mr. Sherman,
1018 and Mr. Hume.

On application of Mr. Blaikie adjourned to November 25th, 1893, at 2 p.m.

New York, November 25th, 1898.

Met pursuant to adjournment.

Present: The Examiner, Mr. Hume and Mr. Blaikie.

On application of Mr. Blaikie adjourned to December 2d, 1898, at 2 p.m.

New York, December 2d, 1898.

Met pursuant to adjournment.

Present: The Examiner, Mr. Hume and Mr. Blaikie.

On application of Mr. Blaikie adjourned to December 9th, 1898, at 2 p.m.

New York, December 9th, 1898.

Met pursuant to adjournment.

Present: The Examiner, Mr. Hume, and Mr. Blaikie.

On application of Mr. Blaikie, adjourned to December 16th, 1898, at 2 p.m.

1019

New York, December 16th, 1898.

Met pursuant to adjournment.

Present: The Examiner, Mr. Hume, Mr. Sherman and Mr. Blaikie.

Council for the complainants states that the completion of the testimony of the complainants is deferred by a stay, granted by the Circuit Judge concerning the testimony of Prescott Hall Butler, a witness whose deposition has been taken and has not yet been completed, and until that stay shall be vacated it will be impossible to proceed and conclude the testimony on the part of
1020 the complainants, and the condition will be brought to the attention of the Court in connection with an application for the extension of the 90 days to which, under the rule, the complainants are entitled.

Adjourned to December 23d, 1898, at 2 p.m.

New York, December 23d, 1898.

Met pursuant to adjournment.

Present: The Examiner, Mr. Sherman, Mr. Blaikie, and Mr. Hume.

Adjourned to January 6th, 1899, at 2 p.m.

New York, January 6th, 1899.

Met pursuant to adjournment.

Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Hume and Mr. Bishop.

Mr. Sherman: Complainants offer in evidence from the appeal book in the Court of Appeals, page 280, the offer in evidence of the codicil to Mr. Fayerweather's will, dated November 15, 1890, as follows:

"Mr. Root: I offer a further codicil to that will now known as the fourth codicil. Codicil marked Exhibit E."

Such offer being in the proceedings of the first day of the trial in January, 1894.

1021

And in that connection, to identify the paper, I offer from that book such Exhibit E as the same appears in the record, being at page 901 of said record. I now call upon Mr. Root and his representative, as the counsel for the Trustees of Hamilton College, to produce the codicil of Nov. 15, 1890, which was there marked Exhibit E, under notice to produce which I have served upon them.

Mr. Hume: That paper is not in our posession.

Mr. Sherman: You admit, do you, that I have served you with notice to produce?

Mr. Hume: I admit that.

1022

WILLIAM BLAIKIE, recalled for further examina- on behalf of the complainants, testified as follows:

By Mr. Sherman:

32 Q. Mr. Blaikie, during the proceedings in the trial in the State Court did you see the codicil, the so-called codicil dated November 15, 1890, and which was introduced upon the trial and marked Exhibit E?

A. Yes

33 Q. Was your attention called to the spelling of the signature of the testator, Mr. Fayerweather?

A. No, sir.

34 Q. Did you particularly observe it?

A. I did.

35 Q. Do you remember how the name was spelled?

A. Yes, sir.

36 Q. State how it was spelled?

A. The surname, F-a-y-r-w-e-a-t-h-e-r.

37 Q. Was the letter "e" between "y" and "r" omitted in the signature?

A. I looked carefully for it and could not and did not see it.

38 Q. Were you present at that trial at the proceedings which purport to be reported or recorded in the appeal book on file at pages 316 and 317?

A. Yes, sir.

1023

39 Q. Does the appeal book correctly state the proceedings as therein recorded in folios 1264 and 1267 inclusive?

A. Substantially they do, yes; verbatim I do not recall.

Mr. Sherman I offer those parts of the appeal book in evidence, beginning with folio 1264, the words "By Mr. James" and ending at folio 1267 with the words "exceptions," and being as follows:

"By Mr. James:

Q. How long have you been acquainted with Mr. Daniel B. Fayerweather before his death?

1024

Mr. Parsons: We would like to inquire for whom in putting this question Col. James is acting.

Mr. James: I am acting for the widow and for Mrs. Achter and Mrs. Emma S. Fayerweather.

Mr. Parsons: The next of kin?

Mr. James: Yes, blood relations.

Mr. Nash: We think they have no standing in this controversy until after the decision of the main question by your Honor.

Mr. James: I suppose this case is to be tried as a single case?

The Court: I shall allow Col. James to ask the question.

Mr. Nash: I should like to state my objection.

I object that the widow and next of kin under the pleadings in this cause have no standing in Court in reference to the litigation of the plaintiffs to establish a trust for institutions different from those created by the deed of gift, and that their interest in the case is only consequential upon certain decisions to be made or ultimately to be given by your Honor; objection overruled; exception.

1025

Mr. Parsons: I wish to have the same objection put upon the records in behalf of the clients I represent.

The Court: Objections overruled; exceptions."

40 Q. Mr. Blaikie, look at pages 329 and 330 of the same record and state whether what appears therein from folios 314 to the end of 316 correctly states what occurred at the trial?

A. You said 1314 to the end of 1316, did you?

41 Q. Beginning with "The Court" in folio 1314 and ending with the end of 1316?

A. I should say it does correctly and verbatim, I think I remember that verbatim, sufficiently to identify it as soon as I see it.

1026

Mr. Sherman: I offer it in evidence. It is as follows:

"The Court: Perhaps it is proper to state what the views of the Court with respect to Col. James' position are.

Col. James' clients were made parties to this action because one of them was the widow and the others the next of kin of Mr. Fayerweather, and as such, in the absence of the will, would be entitled to this estate. If this residuary legacy is set aside in whole or in part, as such widow and next of kin they would be entitled to that money.

That there is or was an agreement of release between the executors and them is immaterial, because in this ac-

tion when the release is proved, they may avoid the release the same as in an action for negligence where the defendant sets up a release, and the plaintiff responds to it by saying the release was obtained by fraud.

It was unnecessary for him to set up the making of releases or to attack the making of the releases in his answer; he could have done it without having alluded to it in the pleadings.

Those are my views upon the position of Col. James."

1027

42 Q. Mr. Blaikie, did you attend upon Judge Truax with the other counsel at the time he announced his decision or read his opinion and before the decision was actually entered.

A. Yes.

43 Q. Where did that take place?

A. In the private room of the Justices of the Supreme Court in the County Court House of this borough.

44 Q. After you had heard the announcement of his decision, did you address any questions to him in regard to the determination of the claims concerning releases?

A. Yes, sir.

45 Q. State what you said to him, and what he said?

1028

A. I asked him what about the widow and next of kin, where did they come in? He said, "I consider that they got $310,000 *that they had no right to*; *I consider it the same as money found.*" The words up to "I consider it the same as money found, I consider verbatim; the last clause "I consider it the same as money found," I think is substantially correct, it may vary a word or two from the way I heard it.

46 Q. In what you did concerning the interests of Mrs. Achter and Emma S. Fayerweather, and as attorney or counsel for them in that litigation, did you act only under your general retainer, or did you have express instructions from them as to the course you should take

and what you should contend for, or what you should waive as their counsel?

A. Under my general retainer.

47 Q. Only?

A. I should say only, yes; without hesitation, only.

48 Q. Well, your contention, when your briefs at General Term and also in the Court of Appeals were prepared or presented, was it your intention by anything you said or did in connection therewith, to waive any rights which Mrs. Achter or Emma S. Fayerweather had to a trial of the issues presented by their answers before a Court in the first instance?

A. No.

1029

49 Q. In your contentions at the General Term and at the Court of Appeals were you aware or conscious of any such possible construction to be placed on your contentions?

A. No, sir.

50 Q. Did Mrs. Achter or Emma S. Fayerweather ever authorize you to waive for them any right which they had to a trial before a Court in the first instance of the issues presented by their answers?

A. No, sir.

1030

51 Q. Or any of them?

A. No, sir.

52 Q. And so far as what you did may be construed in that direction, did you act by any express authority or any other authority from them than a general retainer?

A. No, sir.

53 Q. So far as you know did they derive such information as they had about the progress of the case through you?

A. Largely, I should say.

54 Q. Well, are you aware of any other source of information which they had, but you?

A. It may have been, sir, through Mr. Reynolds, Mr. John B. Reynolds.

55 Q. So far as you know—I do not ask you to speculate, but so far as you know, did they receive information about the progress of the case otherwise than from you?

A. I think Mr. Reynolds once, or more than once, told me that he had had some communication with them, I do not recall it definitely, but I believe that to be right.

56 Q. Well, did he have any information to communicate to them except what he derived from you?

A. No, sir; I do not think a word.

1031

57 Q. Then are you, so far as you know, the source of such information as they had about the progress of that case?

A. I might say that what Mr. Reynolds saw or heard in the Court room, he as a layman might know, but certainly outside of that, nothing.

58 Q. At the time of the contest in the Surrogate's Court were you aware of the proceedings concerning the probate, or the contest of the probate of the codicils?

A. Possibly, from the newspaper reports.

59 Q. You were not in the case at that time?

A. No, sir; had nothing to do with it. I know when I came into it, if you wish that.

1032

60 Q. When did you, or so far as you know, your clients, Mrs. Achter or Emma S. Fayerweather, first become aware that in preparation for the contest in the Surrogate's Court Mr. Arnoux had rehearsed the testimony to the witnesses, and cross-examined them, and put the various contestants' point of view before them, and, in short, rehearsed their testimony as is stated in his testimony concerning the claim that his firm were to be paid the bills which were rendered, and which you have identified here previously in this record?

A. While I was overhauling the first accounts of the executors of Daniel B. Fayerweather before Scott Lord as referee appointed by the Surrogate.

61. Q. I do not know when that was. When was it? Was it after the trial of this Court action before Mr. Justice Truax or before that, that is all I care for?

A. My impression is that it was after, but I am not positive. I do not recall to a month at all.

62 Q. I do not care anything at all about the months, I want to know whether it preceded the trial in the State Court before Judge Truax, or followed it?

A. I do not recollect.

63 Q. Is there any way by which you could refresh your memory and state?

1033

A. Yes, sir; I have the testimony over at my office. (The witness was then allowed to go to his office for the testimony)

64 Q. Mr. Blaikie, have you refreshed your memory so that you are able to fix the time when you learned, or so far as you know the complainants' or any one representing them, first learned of the matters previously described as testified by Judge Arnoux?

A. Yes, sir.

65 Q. Well, fix the time, if you please.

A. December 14, 1892.

66 Q. When was the testimony given?

A. That day.

1034

67 Q. That day?

A. Yes, that is right; that is the date—you mean Arnoux's testimony?

68 Q. Yes. Were you present when it was given?

A. Yes, I asked him the question.

69 Q. The statement about drilling the witnesses came out on your examination?

A. Yes, sir; I learned the military art at that time.

70 Q. Have you testified to that before?

A. Not as fully as I would like to.

71 Q. What else did Mr. Arnoux testify to on that subject?

A. Kindly specify your subject again I understand what you are talking about is the drill that he gave the various witnesses to the testamentary papers of Mr. Fayerweather, witnesses emanating from his office, in order to earn the $50,000 that his firm got.

72 Q. Is there anything more that you remember that he testified to on that subject which you have not already stated?

A. Well, my memory of what I have stated is that I did not go into much detail of what he there said, and I can tell by looking at his testimony here, it looks so familiar, I can tell that he said those words, or certainly substantially those, if you wish them, but they run through a number of pages.

1035

73 Q. I got the impression from what you said that there was something that you remembered that you had not said, that you wanted to say. If you do not recall anything particular, I think we will leave it where it is.

A. If you will let me for a moment refresh my memory I will tell you whether there is anything I want to add; I do not think there is anything special. My impression is that you have covered it; if not, I know now what I want to say.

1036

Mr. Sherman: I think you may cross-examine.

Cross-examination by Mr. Hume:

74 XQ. Mr. Blaikie, were you requested by Judge Truax when he reached his decision in the trial of the action of Amherst College against Ritch to call the counsel together?

A. I was requested by him to do so after he had reached it. I do not know when he reached it.

75 XQ. Yes, after he had reached it.

A. After he had told me that he had reached it.

76 XQ. You went over there to the Judge's private chambers with the other counsel, or at least you were there before the Judge?

A. Yes, sir.

77 XQ. Will you state concisely what happened there on that occasion?

A. My impression is that about two hours before twelve o'clock, or ten o'clock on the morning that the news came from the Judge, he said to me, "Will you notify the counsel to be here at twelve o'clock?" And I then strove to get twenty or more counsel together and hurried around to their offices and succeeded in nearly, if not every instance, in getting the representatives there, and I could recall a number of the gentlemen there, and

1037

others I could if my memory was refreshed; and then the Judge stated that he had reached his decision and conclusion, and the question came up whether we would have special findings or general; there were none ready to offer that I know of, certainly there were none from me, and I am almost equally certain none from Col. James, I am practically positive of that. Then there was a general understanding or agreement that we would have the general findings instead of the special, under the Franklin Bien law, the change of the Code; that there is no doubt of in my mind.

Redirect-examination by Mr. Sherman:

1038

78 RDQ. In your acquiescence in or assent to the course of a short form of decision, did you waive or did you intend to waive a statement of the grounds for the decision?

A. No, sir; in no way.

79 RDQ. Did you suppose in giving that consent, that you would have a full and proper statement of the facts determined by the Court as the grounds for its decision?

A. I did, and I understood that by that form of decision he would cover the entire ground, just as much as he would by the special findings, and that is all the reason that I assented to it.

80 RDQ. And did you understand when the decision was finally served upon you in the form which it took, that by omitting to make any finding, one way or another, on the subject of the releases, that the Court had indicated that it considered the question of the releases entirely aside from the case unimportant? A. You mean by aside, outside of the case?

81 RDQ. Yes, outside of the case and unimportant? A. Yes, sir; especially coupled with what the Court told me.

1039

82 RDQ. As already testified to by you? A. As testified to yes, exactly; that was the impression in my mind at that time; I thought I had his word for it.

83 RDQ. At the time you contended before the General Term upon exceptions to that decision for a determination of the issues concerning the releases, did you do so with the understanding of the record on your part that that question had not been decided by Judge Truax one way or the other?

A. Entirely so.

84 RDQ. And when you contended that the General Term should decide it, did you then have the impression that the new section of the Code, the amendment to the Section 1022 of the Code, authorized the General Term to act as a Court of the first instance?

1040

A. Yes, sir; I got that impression from the last four or five words of that section, at that time.

85 RDQ. And was it for that reason only that you omitted in those parts of your brief which have been put in evidence by the defendant here to specifically ask for a new trial by the Special Term ?

A. For that reason, and because I believed the single exception that we took was so comprehensive that it covered everything, every right of ours and every question that could in any way concern us; I understood that to be the meaning of that single exception. I think Col. James did, too.

86 RDQ. Well, do you say what you have just said in relation to its effectiveness to bring the question before the General Term under your then understanding of the effect of Section 1022 of the Code?

I thought that it brought everything—

87 RDQ. Now, won't you confine your answer to my question?

Read it, please.

89 RDQ. (Question repeated.)

A. Yes.

1041

90 RDQ. What contention did the other parties to the action make to the General Term respecting the power of the General Term to decide this question as a court of the first instance? Was any contention made on that subject by your adversaries, or was any contention made there as to the materiality of those issues raised by the answer of the complainants here?

A. I do not recollect; there was such a mass of it that I cannot recall with any approach to clearness.

Re-cross examination by Mr. Hume:

91 RCQ. Were you served with a copy of the proposed decision and notice of settlement?

A. I have no recollection of it; I do not know; I have not looked to see. I have no recollection of any such thing.

1042

92 RCQ. Did you serve a proposed decision?

A. I have no recollection of that; my impression is that I did not, but I do not recall; I do not know.

JOSEPH LAUX, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct-examination by Mr. Sherman:

1 Q. Mr. Laux, where do you reside?

A. 241 East 46th street.

2 Q. New York?

A. New York.

3 Q. Were you present with Mr. Blaikie and other gentlemen in the room of Judge Truax in the County Court House on the occasion when he announced his decision after the trial of the case in the State Court?

A. Yes, sir.

4 Q. And do you remember a period of the talk when Mr. Blaikie asked him some question about the issues of the next of kin, or something of that kind?

A. He asked him about the ladies and the releases.

5 Q. Now, will you state what you remember that Mr. Blaikie asked and what the Judge said about it on that occasion?

1043

A. Well, after he had read his decision Mr. Blaikie asked him how about the ladies and the releases, and he says he considered the $310,000 that the ladies got was the same as money found, that they had no right to it; that was about the substance.

Cross-examination by Mr. Hume:

6 XQ. At this interview with Judge Truax with regard to which you have testified, do you remember whether the Judge asked counsel as to whether he should render his decision in narrative form or whether he should prepare specific findings of fact and conclusions of law?

1044

A. No, I do not remember that, but I remember that only distinctly that Mr. Blaikie asked Judge Truax about the ladies and the releases.

7 XQ. What is your business, Mr. Laux?

A. My business at the present time?

8 XQ. Yes.

A. Well, real estate.

9 XQ. Are you a relative of any of the complainants in this case?

A. I am not, sir.

10 XQ. How did you happen to be present at this interview?

A. Well, I was present most at all the interviews, Mr. Blaikie—very seldom, I was generally there.

11 XQ. Why were you present at these interviews?

A. Well, I had time to be there and I was just interested to see how the proceedings was going on, that was all.

12 XQ. At this meeting, as I understand it, it was a meeting that was called at Judge Truax's request, was it not, he requested the attorneys representing the parties to be present?

A. Up in his private room.

1045

13 XQ. Up in his private room?

A. Yes, sir.

14 XQ. Well, why were you there at this time? You were not an attorney in the case?

A. I was not, sir.

15 XQ. How did you happen to be in the Judge's private room at this interview?

A. Well, Mr. Blaikie took me in there.

16 XQ. Why did Mr. Blaikie request you to go?

A. Well, I do not know how I could answer that, I was present most any time, at any of the meetings, or any hearings or whatever there was going on there, I was present.

1046

17 XQ. Had you known Mr. Blaikie prior to this?

A. Yes, sir.

18 XQ. Prior to the bringing of this action?

A. Yes, sir.

19 XQ. Had you any interest in the litigation?

A. No sir.

20 XQ. Did Mr. Blaikie request you to go with him to this conference?

A. Well, I knew from personal knowledge that Judge Truax was going to render that decision, and I was present and wanted to hear it.

21 XQ. How did you happen to know that Judge Truax was going to render this decision?

A. Well, I think I was in Mr. Blaikie's office when such word came, I do not know whether I was with Mr. Blaikie over to find out when he was going to render his decision.

22 XQ. How did you happen to take such an extreme interest in this case, you have testified that you were present at the trial?

A. At the trial.

23 XQ. And you seem to have been around the attorneys' offices making inquiries as to various proceedings?

A. I have served papers in it, I served most all the papers connected with the whole case.

1047

24 XQ. When you had been employed by Mr. Blaikie?

A. Well, I do not know whether you can call it employed or not. I was not paid for the employment.

25 XQ. Then was there any other motive than that of curiosity which prompted you to be present and to take this interest in this action?

A. Well, that was about the interest I had, I wanted to follow the case along and—

26 XQ. Well, answer my question directly. Was there anything besides mere curiosity which prompted you to be present and to take this extreme interest in this action?

1048

A. I had no motive at all in being present excepting that I had time to attend these meetings.

27 XQ. You have testified that you were in the real estate business. Have you an office in the city at present?

A. I have not, sir.

28 XQ. Where do you transact your business?

A. I transact it in various places.

29 XQ. In the City of New York?

A. Yes, sir.

30 XQ. Other places?

A. Well, sometimes I go out of the city, I try to do some business in real estate.

31 XQ. Where do you reside?

A. 241 East 46th street.

32 XQ. Do you own property there? Do you own the house in which you reside?

Mr. Sherman: Objected to as entirely immaterial and irrelevant.

The Witness: Do you want me to answer that?

1049

Mr. Hume: Yes.

Mr. Sherman: I think you are at liberty to refuse if you see fit.

33 XQ. Do you refuse to answer that question?

A. I do.

34 XQ. Where have you conducted any business recently? You have testified that you have no office, but that you do business here; tell me where you have transacted any business transactions recently?

A. Do you mean I should tell you the property that I control, is that what you want me to tell you, or what do you want me to tell you?

1050

35 XQ. I want you to tell me where you have transacted any business recently, in what places?

Mr. Sherman: Nobody can testify in this place who is not a person of substance. Now give Mr. Hume all the information you can without inconvenience.

A. Well, I have transacted business in numbers of places.

36 XQ. Well, I asked where, in what particular place. Tell me some place where you have recently transacted business.

A. Well, I transacted business in the office of a man by the name of Ferriss, that is one office, it is over here in Park Row, I do not know just the number, 38, I think.

37 XQ. What was his name?

A. Ferriss.

38 XQ. What was his full name, do you know his initials?

A. His full name, I do not know his full name, he is a lawyer, you can look him up very easily, I think he is down now in this new building that was torn down facing Wall street, opposite the Trinity there, that big high building.

39 XQ. How long ago was that?

A. That might have been less a year, something less than a year, that transaction.

1051

40 XQ. Can you testify any more definitely than that, was it six months ago?

A. That was, that transaction was, I think it was, maybe, ten months ago.

41 XQ. Ten months ago?

A. Yes, about, as near as I could remember it, about ten months ago.

42 XQ. Did that relate to the sale of real property in this city?

A. That related to some property that was conveyed to me, two or three houses, I think it was, I do not know now whether it was two or whether it was three.

1052

43 XQ. Was that the sale of that property which had previously been conveyed to you?

A. It was property that was conveyed to me and I got the title to it.

44 XQ. Was that the sale of that, or was it simply a conveyance to you, this business transaction that you refer to?

A. Yes, sir; that was conveyed to me, the property was conveyed to me.

45 XQ. Have you been interested in any real estate transactions more recently than that?

Mr. Sherman: Wait a minute. That is objected to by the complainants upon the ground that the examination is a manifest attempt on the part of counsel to abuse the rights of cross-examination so as to use up the little remaining time which the complainants have to take testimony, and in view especially of the fact that the counsel for Hamilton College have noticed a motion for to-morrow to vacate an order extending complainants' time to take testimony; and in view of the objection I advise the witness not to answer any further questions of that character, but only such questions as are germain to the matter inquired of in chief.

1053

46 XQ. Will you answer that question? Do you refuse to answer that question?

A. I do at the advice of Mr. Sherman refuse to answer it.

Re Direct-examination by Mr. Sherman:

47 RDQ. Mr. Laux, you are the owner of considerable real estate in Englewood, are you not, that is, it stands in your name?

A. Yes, sir.

48 RDQ. And have you for several years made Mr. Blaikie's office your headquarters and transacted business there?

A. I have.

1054

49 RDQ. Do you recall whether Judge Truax's calling together the counsel was done through Mr. Blaikie and with your assistance, and that his request was that they should get there at a point about two hours after the time when he made the request, or are you not aware of that?

A. I was not aware of that.

50 RDQ. Well, did you in point of fact notify any of the counsel for Mr. Blaikie prior to that conference that the Judge wished them to attend?

A. I did.

51 RDQ. Do you recall some of the counsel whom you so notified?

A. I know I notified a great many, I could not say how many.

52 RDQ. And having notified some of them you went there with Mr. Blaikie, did you?

A. I did.

JOSEPH LAUX.

Sworn to before me this 3d day of March, 1899.

1055 JOHN A. SHIELDS, *Examiner.*

At the request of Mr. Sherman, adjourned to January 7th, 1899, at 10 a. m.

New York, January 7th, 1899.

Met pursuant to adjournment.

Present: The Examiner, Mr. Sherman, Mr. Blaikie and Mr. Hume.

1056

WILLIAM BLAIKIE, recalled for further examination on behalf of the complainants, testified as follows:

By Mr. Sherman:

93 Q. You have spoken of a decision announced by Judge Truax prior to the entry of the formal decision. Was that decision embodied in a written opinion?

A. Yes.

94 Q. Is that opinion found in the Court of Appeals book at pages 1026 and 1055?

A. Yes, inclusive.

Mr. Sherman: I offer it in evidence. It is as follows:

95 Q. Mr. Blaikie, was any reply to the matters set up in the answer of these complainants in the State Court action ever filed or served by any of the other parties to that suit?

A. Reply to the counterclaims, do you mean?

96 Q. Reply to any of the matters in the answer, I am not defining the answer, just the broad question.

A. None served on me, I believe.

97 Q. Well, are you in doubt as to whether there was a reply served?

A. My whole impression is there was not any.

1057

98 Q. Can you refresh your memory so that you will be able to testify whether any reply was ever served by any defendant in that case?

A. Yes, in a moment. No, sir; there was not any reply ever served on me, I do not know anything about it any farther. I was the attorney of record.

99 Q. Well, were you also counsel in the proceedings in Court which occurred?

A. Yes, sir

100 Q. In any of the proceedings from beginning to end was it ever contended by any party in the suit that any reply was before the Court or required the consideration of the Court?

1058

A. No, sir. On the contrary, it was argued by us that there had not been any, especially that there had not been any counterclaim.

101 Q. Well, do you mean to say that there had not been any reply, or that you argued legal principles deduced from the fact that there had not been any reply?

A. I argued the effect of not replying.

102 Q. Upon the uncontroverted assumption that there was not any reply?

A. That is it.

Mr. Sherman: Counsel for the complainants states that he has other witnesses under mandate to attend at this time and that they have not attended, and that it is necessary to take an adjournment for the further taking of testimony.

At Mr. Sherman's request, adjourned to January 11th, 1899, at 10.00 a. m.

New York, January 11th, 1899.

Met pursuant to adjournment.

Present: The Examiner, Mr. Sherman, Mr. Blaikie, and Mr. Hume.

Adjourned to January 18th, 1899, at 3 p.m.

1059 New York, January 18th, 1899.

Met pursuant to adjournment.

Present: The Examiner, Mr. Sherman, Mr. Blaikie and Mr. Hume.

JOHN ARTHUR IRWIN, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

1060

1 Q. You are a physician, sir, are you not?

A. Yes, sir.

2 Q. And how long have been a physician?

A. I have been engaged in medicine, sir, for thirty years; I have been qualified as a practicing physician for over twenty-five years.

3 Q. And how long have you practiced in this city?

A. Since 1883.

4 Q. Where do you reside?

A. 14 West 29th street.

5 Q. You have resided there some years, have you not?

A. 11 years, sir.

6 Q. Were you an attending physican upon Mrs. Daniel B. Fayerweather prior to her death?

A. Yes, sir.

7 Q. Do you remember when she died?

A. She died, I think, in July, 1892.

8 Q. Of what disease did she die, if you know?

A. Diabetes mellitus.

9 Q. For how long before her death was she afflicted with that disease?

A. I understand, sir, for about 13 or 14 years.

10 Q. Do you remember the occasion, the time of her husband's death on November 15, 1890, with reference to her condition?

A. Yes, sir.

1061

11 Q. What was her condition at that time with reference to this disease?

A. Her condition was more or less aggravated by the anxiety attendant upon her husband's death?

12 Q. Do you remember the occasion of the proceedings concerning her husband's will in the Surrogate's Court of New York County about February or March, 1891?

A. Yes, sir.

13 Q. Were you present in the Court on some occasions during that proceeding?

A. On several occasions, sir.

1062

14 Q. And did you accompany Mrs. Fayerweather's sister, Miss Anner Amelia Joyce, on those occasions or some of them?

A. I do not think I ever accompanied her to the Court, but I met her at the Court on more than one occasion.

15 Q. You knew her as an inmate of Mrs. Fayerweather's house?

A. Yes, sir.

16 Q. And as her sister?

A. Yes, sir.

17 Q. What general relation to the household did Miss Joyce appear to have during that period of your ac-

quaintance with her, and down to the time of Mrs. Fayerweather's death?

A. Those of the most happy family relationship.

18 Q. Well, what part did she seem to take in the household affairs?

A. Well, she seemed to supplement her sister's office, her sister being an invalid.

19 Q. Do you know Henry B. Vaughan?

A. I do not know him, sir, I have seen him.

20 Q. Do you know him by sight?

A. I know him by sight.

1063

21 Q. Did you see him at any time in the Surrogate's Court during the proceedings I have mentioned?

A. Yes, sir.

22 Q. Do you remember an occasion on the afternoon of some day when proceedings had been going on in the Surrogate's Court, when Mr. Vaughan accosted Miss Joyce and spoke with her in a manner to attract your attention?

A. Yes, sir.

23 Q. Will you describe that scene as well as you can?

1064

A. On that occasion the sitting of the Court had just ceased, and the majority of the persons present had already left the Court or were leaving, and I had been sitting next to Miss Joyce during the proceedings, and according to my recollections we had already arisen to leave, when Mr. Vaughan, coming up the aisle from the bench, called Miss Joyce to him, called her towards him; and for the moment, not knowing the nature of his conversation, I stood a little in the background; but the conversation was unusually animated, and I noticed that his manner was exceedingly excited and threatening, and consequently I approached and I heard a part of the conversation. The part which I heard was, in substance, I did not note the words very closely at the time, but it was distinctly in substance that Mr. Vaughan intended

to fight this matter out to the last cent of the estate, and that he directed Miss Joyce to tell her sister that, and than her sister had better know the matter; and in saying this he shook his fist in Miss Joyce's face in a very violent and threatening manner; and then I called Miss Joyce away and Mr. Vaughan left.

24 Q. Have you any knowledge as to whether Miss Joyce communicated this scene to her sister, Mrs. Fayerweather?

A. A general knowledge, distinctly.

1065

25 Q. State what you know about that?

A. Well, sir, I was in constant attendance on Mrs. Fayerweather at that time. During this period I think I saw her professionally on an average once or twice a day and I was present at various conversations bearing upon this matter, and I do not exactly remember whether I heard Miss Joyce tell this fact to her sister or not, but I am distinctly positive of the fact that she had told it to her sister, by my own conversation with her sister.

26 Q. What comments, if any, did Mrs. Fayerweather make upon these remarks in your hearing?

1066

A. Mrs. Fayerweather, sir, was a little taciturn, I do not know anything different but she assented to the propositions which were put before her; she had received this message and apparently was very much shocked and terrorized by this message.

27 Q. Will you give in detail what occurrences you observed which you summarize by saying that she was terrorized by these remarks? What effect did it have on her that was perceptible to you as symptoms of something else?

A. Mrs. Fayerweather's general condition as the result of her disease, was one of unusual nervous irritation, and a tendency to disturbance by annoyances great or small.

28 Q. Agitation, do you mean?

A. Not visible agitation, but the effect on her nervous system, as it is in all chronic diabetics, was that of extreme irritablity under nervous agitation or annoyance of any kind. These conditions were aggravated by any unusual annoyance or disturbance; and following this communication of this information, Mrs. Fayerweather's condition was very much aggravated for a considerable period.

29 Q. Has excitement or annoyance any injurious effect upon a person suffering from diabetes?

A. Most distinctly and emphatically so.

1067

30 Q. Is it part of the recognized treatment of that disease to relieve and shield the patient from anything of that kind?

A. Distincly to shield them from annoyances of any kind.

31 Q. What is the observed effect of unusual excitement or annoyance or anxiety upon a person suffering from diabetes?

A. The marked aggravation of pathological condition, which is an excessive elimination of sugar or glucose in the urine, and also an aggravation of all the constitutional symptoms of debility and nervous depression; and the other general symptoms of the disease.

1068

32 Q. Has a condition of disease from diabetes, aggravated in that manner which you have described, any effect upon the firmness or vigor of the brain and of the will power?

A. Distinctly.

33 Q. How does it affect the vigor of the brain and of the will power, the firmness of the mind?

A. The disease, following its usual course, impairs the mental vigor, so far as force and determination are concerned. Anything which aggravates the disease would in the same proportion lessen the will-power, lessen the force of character.

34 Q. From what you have stated and from what you know of Mrs. Fayerweather's condition of mind and body about the month of March, 1891, was she in such a condition that she could calmly weigh the various considerations that would enter into the execution by her of such a paper as, say, a release of all claims which she had or might have under her husband's will, or under the laws of this State on the subject of wills, affecting a property of very large amount, so that her act in executing such a paper or release would be regarded as rational or irrational?

A. May I hear the question again?

1069

35 Q. (Question repeated).

A. Her condition would strongly influence her in favor of anything which would settle the question at issue, and relieve her of the anxiety which she herself recognized as dependent thereon.

36 Q. What would you say about this point, Doctor, would the existence of such physical and mental conditions as then existed in her, as you have testified and as your knowledge goes, lead her to regard present peace of mind and freedom from mental distress as more important then any future acquisition of property?

1070

A. I remember, sir, very distinctly urging that view upon her myself; I remember urging the view upon her that her immediate piece of mind and peace during the relatively short period of life which in all scientific probability was left to her, was more important to her than the future acquisition of any estate for her heirs, or those who might come after her.

37 Q. And what response did she make, if any, to your advice so conveyed?

A. Well, sir, it was her custom to agree with all my advice. I had been her medical adviser, I think, for seven or eight years previously, and she believed in me absolutely.

38 Q. And was it subsequently to that advice so given that she executed the papers leading to the releases.

A. So I understand, sir.

39 Q. What fact, if any, can you state with regard to her feeling at liberty to accept or reject the propositions of the executors of Mr. Fayerweather, I mean as to whether she felt that she had entire freedom of choice to accept or reject their propositions?

A. Well, I remember conversations in which it was imparted to me that her immediate condition was one of extreme straitness in money matters, and that it was necessary for her to do something in order to meet her immediate expenses.

1071

40 Q. What representation did she make as to the cause of her being straitened in money matters, what was in her mind on that matter that she conveyed to you?

A. That the executors of her husband's estate had refused to give her any money at all unless she agreed to the proposition proposed to her.

41 Q. Did she ever say anything before the execution of these papers, in March, 1891, in your hearing, to indicate that she felt coerced or otherwise by Mr. Vaughan, and if so, what?

1072

A. I do not remember her saying anything about Mr. Vaughan personally; he, of course, was discussed as an element in the coercion; but as far as I remember, it was the executors generally, I think, with the exception of Mr. Bulkley, who was regarded in the family at that period as being an entirely honest and straightforward element.

42 Q. Did Mrs. Fayerweather say anything in your hearing prior to the execution of the papers of March, 1891, in regard to the fact that Mr. Ritch was retained as an executor of Mr. Fayerweather?

A. Will you repeat the question?

43 Q. (Question repeated.)

A. I do not remember anything specific.

44 Q. Did Mrs. Fayerweather say anything prior to the execution of those papers as to whether the withholding of the money by the executors caused her any inconvenience or worry, and if so, what did she say in your hearing?

A. She distinctly and on several occasions implied those facts; I do not remember her words, but it was implied to me that there was some, or a good deal, of embarrassment because of all moneys being withheld.

45 Q. She was then living in the house 11 East 57th street, New York?

A. Yes, sir.

1073

46 Q. And that is a large house the keeping of which would entail a considerable expense, I believe?

A. Yes, very large, considerable.

47 Q. And had she any resources apparently except what she was entitled to from the executors, which was withheld?

A. Not that I was aware of.

48 Q. Well, did she ever convey anything herself to you on that subject?

A. It is impossible, sir, to state or to recall conversations, but my impression is that I was given to understand that.

1074

49 Q. What was Mrs. Fayerweather's condition on the evening of the day on which Mr. Vaughan menaced Miss Joyce, as you have testified?

A. I, sir, have refreshed my memory by looking over my accounts as to dates that I attended the Court, and I think that that date—there is no note in my ac counts on that subject, because it had not come up, it simply the fact that I charged an attendance at Court that day—I think that day was the 2d of March.

50 Q. 1891?

A. 1891. And on that day I think I visited the house three times, and on the following day twice, and I

think that Mrs. Fayerweather's condition at that particular period only largely by this fact in my accounts was very much aggravated or else I should not have attended more than once every day or once every second day as was my custom at other times.

51 Q. And how did Mrs. Fayerweather's condition compare with the previous condition from the time of that interview until the execution of these papers in March, 1891?

A. She was very ill about that time.

52 Q. Well, are you able to say whether, in your opinion her illness was to be ascribed to that cause or to to some other cause?

1075

A. Distinctly to some extraneous cause, to some cause that was disturbing the natural course of her disease.

53 Q. Well, was that cause, the knowledge of her sister's interview with Mr. Vaughan, the only apparent cause of that aggravated condition?

A. So far as I am aware of.

54 Q. And was that cause sufficient to produce the symptoms which you have recalled and have testified to?

A. Very distinctly.

1076

55 Q. Are you able to say what effect, if any, upon the termination of her disease was caused by this controversy over the will of her husband and its attendant excitement?

A. Well, sir, Mrs. Fayerweather's case stands as a peculiar one in the records of medicine. She almost reached the extreme limit of her disease, as far as I am aware of. I attended her for, I think, about eight years prior to death, but her disease had existed for a long period before that, I think for at least 5 years or perhaps 6 prior to my attendance; and 14 years of diabetes is a very long period. Prior to Mrs. Fayerweather's death, from the time she came under me, I might say I was not her attendant, but I understand that a year

or so prior to my attendance she suffered from diabetic coma which is regarded usually as the termination of the disease; that during the period of my attendance in the early part she improved very rapidly, the pathological signs of the disease were reduced to a minimum; that as I have already stated it is regarded by medical men as of the first importance that diabetic patients should be protected from all annoyance and worry; that at this period Mrs. Fayerweather's condition was very alarmingly aggravated so that if it had not subsequently improved, the termination would have come very rapidly; that subsequently to this period Mrs. Fayerweather improved again and went on, I think, for nearly a year and a half, when the symptoms culminated in not an unusual termination of her disease.

1077

56 Q. Well, speaking from a medical point of view of her condition, was the choice presented to her by this proposed settlement propounded by the executors, having regard to the symptoms produced by that interview with Mr. Vaughan as you have described, was the choice presented to her of continuing the contest over the will at expense of her life; or accepting such terms as were proposed with the opportunity to live through the term of the disease?

1078

A. I am satisfied that if the worry of that period had been continued in the same active shape Mrs. Fayerweather could not have lived more than a few months.

57 Q. And was that alternative distinctly presented to her by your advice?

A. By my advice, sir, very strongly, in every way and in every aspect.

58 Q. Had you any knowledge, Doctor, of Mr. Fayerweather's physical condition for, say, two weeks prior to his death?

A. May I refer to a note I made from my book?

59 Q. Certainly, any memorandum which you think will refresh your memory.

A. (Referring to memorandum.) I last saw Mr. Fayerweather on the 6th of October, 1890, by his special request, he sent for me.

Mr. Sherman: You may cross-examine, Mr. Hume.

Mr. Hume: I am not prepared to cross-examine, and I will reserve my right to cross-examine until a future hearing, and will ask that the witness be produced at the next hearing for that purpose.

1079

Mr. Sherman: You will have to produce the witness yourself unless you examine him now. Counsel for the complainants states that he has tendered the witness for cross-examination after a session of about half an hour, and insists that the complainants will be under under no obligation to produce the witness for cross-examination, unless it shall proceed at this time.

The Examiner: I will order him to be here at the next session for cross-examination, but the defendant will have to pay his fees.

Mr. Hume: Unless notified that he will not be wanted.

The Examiner: Yes.

1080

Adjourned to January 21st, 1899, at 3 p. m.

J. A. IRWIN, M, D.,
14 W. 29th Street, N. Y.

Sworn to before me this 15th day of March, 1899.

JOHN A. SHIELDS,
Examiner.

New York, January, 21, 1899.

Met pursuant to adjournment.

Present: The Examiner, Mr. Blaikie and Mr. Hume.

REYNOLD W. WILCOX, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct-examination by Mr. Blaikie:

1 Q. What is your occupation?
A. I am a physician.
2 Q. How long have you been a physician in practice?
A. About eighteen years.
3 Q. In this city?
A. In this city about fifteen years.

1081

4 Q. In active practice.
A. Yes, sir.
5 Q. Did you know the late Daniel B. Fayerweather?
A. I did.
6 Q. When did you last see him, and where?
A. I saw him last in November, 1889.
7 Q. He died on November, 15, 1890?
A. Then I saw him on the 11th day of November, 1890.
8 Q. Where?
A. At his house.
9 Q. How did you happen to go there?
A. At his request.

1082

10 Q. On a professional call?
A. No, sir; to be a witness to a will.
11 Q. For what purpose?
A. To be a witness to a will.
12 Q. And what room there did you see him in?
A. Second story front room.
13 Q. Who was in it besides you and him?
A. A lawyer and Dr. Vedder.
14 Q. What is the lawyer's name?
A. I know his name from having seen it in the testimony, Prescott Hall Butler. I did not know it at the time.

15 Q. Who else was in the room besides you gentlemen?

A. Later, Miss Lizzie Joyce, she was there as a witness to the codicil.

16 Q. Please state what took place in that room while you were there.

A. While I was there this lawyer read over a paper to Mr. Fayerweather, and when he had finished, Mr. Fayerweather—I think some one, either Mr. Fayerweather or Dr. Vedder, asked me to bring Miss Joyce into the room to be a witness to the codicil; I then stepped out of the room for a moment.

1083

17 Q. Who asked you to witness it?

A. Dr. Vedder informed me that Mr. Fayerweather wished me to be at his house at twelve o'clock to be a witness to his will.

18 Q. Now, what time was this?

A. It was not far from 12 o'clock.

19 Q. How long were you in that room at that time?

A. I was not there over ten minutes, probably less.

20 Q. And what did Mr. Fayerweather say?

1084

A. Mr. Fayerweather when I came in bowed to me and said good-morning, or something of that kind, and the lawyer immediately sat down by his side, and Dr. Vedder preceded me, and we withdrew to the window in the room.

21 Q. You say you signed this paper as a witness?

A. As a witness, yes.

22 Q. How did you happen to do that, did anybody ask you to?

A. Yes, sir.

23 Q. Who?

A. Dr. Vedder said that Mr. Fayerweather wished me to go there, that is the occasion of my going to the house; then the attestation clause was read.

24 Q. Who read the attestation clause?

A. The lawyer.

25 Q. Read it audibly, so that all could hear it?

A. Yes, sir; so that all could hear it.

26 Q. And at that time what was the mental condition or Mr. Fayerweather, was it ordinarily capable?

A. It was ordinary, as he had been for a number of months. He made the remark as I left the room that he would be pleased to do the same thing for me some time, which was in his jocular way of speaking.

1085

27 Q. But so far as you know, he was of sound mind?

A. Perfectly.

28 Q. And you did sign the attestation clause of that codicil as a witness?

A. Yes, sir.

29 Q. Who stated it was a codicil?

A. In the attestation clause it was acknowledged as a codicil to his will.

30 Q. Who else signed it besides you?

A. Dr. Vedder and Miss Lizzie Joyce.

31 Q. And was any part of it read, and if so, by whom in the room?

1086

A. A paper was read to Mr. Fayerweather by the lawyer in my presence.

32 Q. And read aloud, so that Mr. Fayerweather could hear it?

A. It was, I presume.

33 Q. And was Mr. Fayerweather in any way defective in hearing at that time?

A. He was somewhat deaf.

34 Q. And the lawyer read loud enough, so that you could hear his words, could you?

A. I could hear occasionally a word or a sentence.

35 Q. If you cared to pay attention?

A. Yes.

36 Q. And did Mr. Fayerweather say anything in your hearing to the lawyer or to anyone else, and if so, what was it?

A. He stopped the lawyer at one point in his reading, and said, "Now everything is to be paid up, and settled, and the institutions are to have their money, and the rest divided."

37 Q. He spoke that up so that all those in the room could hear that readily?.

A. I heard Mr. Fayerweather's voice, I did not turn to see who was speaking, but that was Mr. Fayerweather's voice.

1087

38 Q. Were you notified in any way to come to that house at any time after November 11th, 1890?

A. I was.

39 Q. How and what?

A. By Dr. Vedder, who asked me to meet him there, I think, at five o'clock that afternoon, that was on the 15th of November.

40 Q. Did you go?

A. No, sir; I did not.

41 Q. Why?

1088

A. Because—it was either four or five o'clock, I have forgotten which—and a short time before that Dr. Vedder informed me that we were not wanted there, that our presence was not wanted.

42 Q. Where in the room was Mr. Fayerweather at the time you were there, Doctor, on November 11th?

A. He was seated at a table on the east side of the table, in the middle of the room.

43 Q. About how large a room was it, if you know?

A. I should think it was about twenty feet square.

44 Q. Which way was he facing?

A. He was facing west.

45 Q. And where were you as to him?

A. I was with my right side towards him.

46 Q. About how many feet from him?

A. Probably ten or fifteen feet.

47 Q. And Dr. Vedder was where at that time?

A. Dr. Vedder was facing me, and talking with me the greater part of the time.

48 Q. This was throughout the time that the lawyer was talking to him?

A. Yes, sir.

49 Q. How did you know it was a codicil?

A. It was so declared to be in the attestation clause.

50 Q. How long had you known Mr. Fayerweather before that?

1089

A. I had known Mr. Fayerweather since about 1875 by sight, and I had known him to speak to him since 1885, probably; I became associated with Dr. Vedder in practice in 1885, and Mr. Fayerweather was one of his patients, and I met him about that time to know him, although I had known him by sight for about ten years before.

51 Q. Did you write down anything at the time that you were in that room?

A. I wrote a statement on the day, I think, following Mr. Fayerweather's death; it was a Sunday, if I remember correctly, at Dr. Vedder's dictation.

1090

52 Q. What was that about?

A. It was about the affairs of the 11th, about what he knew of the affairs of the 11th, and it may have included, I do not remember now, but it may have included something about the 15th, also.

53 Q. You mean as to what took place in Mr. Fayerweather's house, while you were there on the 11th.

A. While he was there, I think while I was there also.

54 Q. Was Mr. Vaughan in that house on the 11th while you was there that you saw?

A. I did not see him. There was a gentleman whom I did not know passed in before Mr. Butler and I, Mr. Butler and I went in together.

55 Q. Perhaps of what age?

A. I did not notice the man distinctly, I would not know him if I should see him, and I do not know that I had ever seen him before.

56 Q. What did you do with the memorandum that you speak of that you made?

A. I wrote it at Dr. Vedder's dictation, and handed it to him.

1091

57 Q. While you were there, did you see Mr. Fayerweather sign any paper?

A. I saw him sign this codicil.

REYNOLD W. WILCOX,
Signed Feb'y 22, 1899.

Sworn to before me this 3d day of March, 1899.

John A. Shields, *Examiner*.

Mr. Blaikie: That is all.

Mr. Hume: I am not prepared to cross-examine at the present time.

1092

Mr. Blaikie: Can you go on on Thursday at four o'clock.

Mr. Hume: Will we have the same understanding with regard to the attendance of this witness for cross-examination as in the case of the last witness?

Mr. Blaikie: Let me know two days in advance.

Adjourned to January 26th, 1899, at 4 p. m.

New York, January 26, 1899.

Met pursuant to adjournment
Present: The Examiner, Mr. Sherman and Mr. Hume.

WILLIAM LLOYD, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct-examination by Mr. Sherman:

1 Q. Dr. Lloyd, you are a clergyman, are you not?

A. Yes, sir.

2 Q. And of what church are you pastor?

A. Central Congregational.

3 Q. And where is that located.

A. It is located now at 230 Amsterdam avenue.

4 Q. And where was it located in and prior to 1890?

A. 309 West Fifty-seventh street, and previous to that at the corner of Forty-seventh street and Madison avenue.

1093

5 Q. Did you know the late Daniel B. Fayerweather in his lifetime?

A. Yes, sir.

6 Q. Was he a member of your congregation?

A. Yes.

7 Q. How long had you been acquainted with Mr. Fayerweather prior to his death?

A. Well, about fifteen years, I think, from 1878 or 1877—1877, I think, was my first acquaintance with him.

1094

8 Q. Will you state what your social relations with him were?

A. Well, they were very close and very pleasant.

9 Q. Were you frequently at his home in Fifty-seventh street?

A. Very frequently, and for some four or five years before his death it was my custom to dine at his home every Saturday; then oftentimes—perhaps I can show you how close they were for a few instances.

10 Q. If you please.

A. As, for instance, when his mother died, I attended the funeral of his mother. When he was about to put up a monument for his mother out in the country, where

she was buried, somewhere near Bridgeport, I accompanied him and we arranged what the monument should be. When he wished to give books to the town library, why, I purchased the books, or if I did not purchase them, I gave him an idea of what would be the best books. And oftentimes when he used to go up to Clearfield to his tanneries, feeling that he was getting a little old, perhaps, and he did not feel like going alone, he would send for me at a moment's notice, and I would go with him to Clearfield. Our relations were of that kind.

11 Q. How was it in the summer time, did you visit him in the summer time?

1095

A. When I was in this country in the summer, I frequently visited him.

12 Q. Where?

A. At Long Beach two or three times over, when he was staying at the Long Beach Hotel, I think, in the last year of his life, he was at the Long Beach Hotel if I remember rightly.

13 Q. When did you last see Mr. Fayerweather?

A. I should judge the Saturday before he died.

14 Q. Did you dine at his house on that occasion?

A. Yes.

1096

15 Q. That must have been the 8th of November, 1890, Saturday?

A. It is so long ago I do not remember the date when he died.

16 Q. He died on the 15th?

A. Then it would be the 8th. It was my custom after I had dined to go upstairs with him, and then the evening papers lay there, you know—

17 Q. You mean with him, or to him?

A. With him. He used to generally dine downstairs with us, but I used to go upstairs and read the evening papers to him.

18 Q. Was Mr. Fayerweather hard of hearing?

A. The latter part of his life he was growing hard of hearing.

19 Q. Was it necessary to speak in a high pitch or a loud volume of voice to make him hear?

A. You did not have to shout to him; I would read like that to him the latter part of his life (indicating).

20 Q. Did he appear to watch your lips to get your meaning, or would he rely on his hearing altogether?

A. He would rely on his hearing.

21 Q. Are you able to say whether he had any difficulty with his sight in the latter part of his life?

A. No more than his wearing spectacles.

1097

22 Q. Did he always wear spectacles to read?

A. Always wore spectacles while I knew him to read.

23 Q. Did he also use a magnifying glass?

A. Yes, sir; he used a magnifying glass when he wanted to look at anything small.

24 Q. In addition to the spectacles?

A. Yes, sir.

25 Q. Was there one at hand that he used in his room?

A. I am quite sure there was; I have a recollection of his taking up a magnifying glass to look at things sometimes, his sight was not good, it was not as good the latter part of his life as it was before, I think.

1098

26 Q. Had Mr. Fayerweather expressed to you any desire as to your being with him at his approaching dissolution, and what did he say, if anything?

A. Well, not definitely. He was a man who said very little, but sometimes when I was talking with him, after his illness began to develop distinctly; I remember once particularly; I was talking with him down at the Long Beach Hotel and he said to me, "Well, Dominie, you will be with me, whatever happens," and I said, "Why, certainly, send for me any minute, Mr. Fayerweather," but I did not understand him then to be under

immediate apprehension of death, or anything of the sort, you know, I took it to mean when I left Long Beach, if he should be taken worse, or if he wanted to see me, he would send for me at any time.

27 Q. Did you call at the house on the Saturday of his death?

A. Yes.

28 Q. At what time?

A. I should judge about five or half-past; that was my usual hour for going there.

1099

29 Q. And whom did you meet at the door?

A. A colored man, the butler.

30 Q. Was he the person who customarily opened the door?

A. Yes.

31 Q. Did Mrs. Fayerweather come down at that time?

A. After I had gone into the room between the dining room and the parlor, Mrs. Fayerweather came down.

32 Q. And what, if anything, did she say?

1100

A. She came in and spoke about Mr. Fayerweather bein very low indeed, very low. The colored man meeting me at the door, when I said to him, "How are they all?" he said, "Oh, Mr. Fayerweather is very sick." And Mrs. Fayerweather was very much agitated, very much, and began to cry, of course she thought he was dying.

33 Q. Did you meet Mr. Vaughan on that occasion?

A. I first asked, I think, for Morris Beardsley, because he used to be often there to dinner on Saturday also, and his wife, and they said Morris had gone out, I think, if I remember rightly, to try and get Dr. Janeway to consult with Dr. Vedder who was attending him; and after a while Mr. Beardsley came in, and I am not sure whether Mr. Vaughan came in with him or whether Mr.

Vaughan came down the stairs, that I cannot tell, but I know that Mr. Beardsley introduced me to Mr. Vaughan.

34 Q. You had never met him before that?

A. Never had met him before.

34 Q. Did Mr. Vaughan know who you were?

A. Mr. Beardsley said, "This is Mr. Fayerweather's minister, Mr. Fayerweather's clergyman"—but you must understand that it was a room dimly lighted, you know, just between the dining room and the parlor, and I do not think that if I should meet Mr. Vaughan accidentally on the street, that I would recognize him.

1101

36 Q. Did you have any conversation with him on that occasion?

A. None at all.

37 Q. And where did he go after that introduction?

A. Upstairs.

38 Q. And after Mr. Vaughan had gone up stairs, did you go to dinner?

A. Yes.

39 Q. Who dined together on that occasion?

A. Mr. Beardsley and Mrs. Fayerweather, I think, and Mrs. Lizzie Joyce, the niece—I don't know whether she was the niece of Mr. Fayerweather, or whether she was the niece of Mrs. Fayerweather.

1102

40 Q. Not Miss Anner Amelia Joyce?

A. No, sir; a much younger one, Miss Lizzie Joyce.

41 Q. Did you express a desire to see Mr. Fayerweather after dinner, or at dinner?

A. Yes, I said at dinner that I would like to see him if he was conscious.

42 Q. And what did Mr. Beardsley say to that, if anything?

A. Well, after he left the table, I said again to him, after we had gone into the other room, I said, "I would like to see Mr. Fayerweather if he is conscious, be-

cause I think he would like to have me with him when he dies," and if he was conscious, I would like to offer a prayer, and Mr. Beardsley said, "I will see," and went out and came back and said, Mr. Vaughan said that he did not think it was necessary, and I did not see Mr. Vaughan after this at all; and I stayed probably until after seven o'clock, and then I said to Mr. Beardsley and whoever else was present—Mrs. Fayerweather or Lizzie, I said, "If you find that Mr. Fayerweather recovers consciousness, and would like to see me, you can send at any hour and I will get up and come back." But I heard nothing until the next morning, when I got a message saying he was dead.

1103

43 Q. You know Mr. Myrick, who was in Mr. Fayerweather's employ?

A. No, I do not know him.

44 Q. So far as you know, was he there that day?

A. I do not remember seeing Mr. Myrick at all, —possibly if I saw Mr. Myrick now I would know him, but not know him as Mr. Myrick, because I used often to go into the store, and Mr. Fayerweather would take me right back, you know, and I would see the men who were at the desks, but I do not think I was ever introduced to Mr. Myrick.

1104

45 Q. Well, was there any other man in the house while you were there, except those whom you have just enumerated?

A. Not to my recollection now, at all.

WILLIAM LLOYD.

Sworn to before me this 16th day of March, 1899.

JOHN A. SHIELDS, *Examiner.*

Mr. Sherman: You may cross-examine, Mr. Hume.

Mr. Hume: I am not prepared to cross-examine, but will ask that the witness be produced at the next hearing for that purpose.

Adjourned to February 2, 1899, at 2 p.m.

New York, February 2d, 1899.

Met pursuant to adjournment.

Present: The Examiner, Mr. Blaikie and Mr. Sherman.

1105

ELIZABETH RHODES JOYCE, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Blaikie:

1 Q. What is your name?

A. Elizabeth Rhodes Joyce.

2 Q. What is your occupation?

A. Trained nurse.

3 Q. Did you know the late Daniel B. Fayerweather of this city during his lifetime?

A. Yes, sir.

4 Q. And was he related to you in any way?

A. He was uncle by marriage.

1106

5 Q. And do you know when he died?

A. November 15th, 1890?

6 Q. Where?

A. At his residence, 11 East 57th street.

7 Q. When did you last see him, if ever?

A. On the afternoon before he died, the afternoon of the day he died.

8 Q. Had you seen him earlier in that day?

A. Not at all.

9 Q. And how did you come to see him that afternoon?

A. I was called in as a witness to a paper.

10 Q. Who called you? State what was said to you about being a witness.

A. I was told by Mrs. Reynolds early in the day that I was wanted as a witness, or would be wanted as a witness to this paper later in the day.

11 Q. And pursuant to that call, what happened next, what did you do about being a witness to that paper, were you to be called later, were you to be notified when to come?

A. Yes.

1107

12 Q. Were you notified?

A. Yes, I was.

13 Q. Were you notified to do what, when you were notified what you were told?

A. I was called downstairs.

14 Q. And you were where, when you were called downstairs?

A. Upstairs on the third floor.

15 Q. The third floor of 11 E. 57th street?

A. Yes.

16 Q. And you were called down to what floor?

A. The floor below.

17 Q. And what room?

A. The sitting room.

1108

18 Q. Which is what room on that floor?

A. The front room.

19 Q. The front room on the second floor of the house, is it?

A. Yes, sir.

20 Q. Who were there when you went in, if anybody?

A. Mrs. Fayerweather, Mr. Vaughan, Mr. Grout and Mr. Browning.

21 Q. What was said to you, or by you to anybody, if anything was said while you were there?

A. I was simply introduced to Mr. Grout and Mr. Browning.

22 Q. Who introduced you?

A. Mr. Vaughan.

23 Q. State what was said there by anybody while you were in that room, if you can remember. First let me ask you how long were you in there at that time?

A. Just a moment or two.

24 Q. Was anything said by anyone, and if so, what?

A. Nothing that I remember, excepting Mr. Vaughan said that everything was ready.

25 Q. And what happened next?

A. Next Mr. Browning and Mr. Grout and I went into the backroom, Mr. Fayerweather's bedroom.

1109

26 Q. Did they know the house, did they know where to go, so far as you know?

A. No, I led the way.

27 Q. You led the way?

A. Yes.

28 Q. Who was in that room when you got there?

A. No one but Mr. Fayerweather.

29 Q. What was he doing?

A. He was in bed, propped up by pillows.

30 Q. Did he have some bed covering over him, as any person in bed would have?

A. Yes.

1110

31 Q. And what was said, or how long were you in that room in all at that time?

A. Not more than five minutes.

32 Q. And how long were Mr. Grout and Mr. Browning in there, the same length of time?

A. The same length of time.

33 Q. As soon as you got in there, state what happened there, and state it in the order that it did happen, as well as you can remember it?

A. As we went into the room, Mr. Grout spoke to Mr. Fayerweather, passed the time of day, and he nodded in response.

34 Q. Mr. Fayerweather nodded in response?

A. Yes. Then Mr. Grout made some remark that he had come to witness this paper, and went around to the side of Mr. Fayerweather's bed and stood at the side. at the head of the bed, at Mr. Fayerweather's side, and proceeded to read this paper which he had in his hand, the contents of which I know nothing of; and then he asked in the usual way if he wanted us to witness it or to be witnesses, and asked for a pen and ink, and there was none in the room; so I went back into the front room to get this pen and ink, and was gone just long enough to

1111

get it, and I brought it back and dipped the pen in the ink, and handed the pen to Mr. Grout, and he handed it to Mr. Fayerweather, and put it in Mr. Fayerweather's hand, and put his hand on the paper where he was to sign, and supported his hand as he wrote his name.

35 Q. Who did that?

A. Mr. Grout; and after that Mr. Browning and Mr. Grout and I signed our names also, and then we left the room.

36 Q. What did Mr. Fayerweather say while you were in the room?

A. He said nothing.

1112

37 Q. Did not say one word even?

A. No.

38 Q. When Mr. Grout spoke to him or read to him, did Mr. Grout speak in an ordinary tone, or in a low tone, or in a loud tone?

A. Just an ordinary tone of voice.

39 Q. And at that time will you describe Mr. Fayerweather's position in the bed?

A. He was sitting up quite straight, propped up with pillows behind him.

40 Q. Behind him?

A. Yes, sir; pillows behind him.

41 Q. He was sitting up in bed, and with pillows behind him—go on, please—otherwise he was how, what was his position in the bed?

A. Why, he was sitting up in the bed, if that is what you mean.

42 Q. While you were there did he change his position in any way?

A. Only after signing this paper, he threw his head back on the pillow.

43 Q. Did he move his feet in any way, while you were there?

A. Not at all.

1113

44 Q. Did he expose either foot?

A. No.

45 Q. Would you have seen it if he had?

A. Yes.

46 Q. Did he put either foot or both feet over the side of the bed in any way?

A. No, he did not move his feet at all.

47 Q. Did he have his glasses on, while you were there?

A. No.

48 Q. Spectacles or eye glasses, or any kind of glasses?

A. No.

1114

49 Q. And were you in that room earlier in the day, did you see him earlier at any time in the day than that, yourself?

A. No.

50 Q. You did not see him?

A. No.

51 Q. You say that he signed his name to a paper; what did the paper rest on when he signed it?

A. The paper rested on a book. Mr. Grout had placed the paper on a book, and placed the book in Mr. Fayerweather's lap.

52 Q. When Mr. Grout had hold of his hand while he was writing his name, did Mr. Fayerweather seem to be conscious of what he was doing, did he seem to know what he was about?

A. Well I did not notice that particularly.

53 Q. All the time that Mr. Fayerweather was writing, did Mr. Grout have hold of his hand?

A. Yes.

54 Q. All the time?

A. Yes.

1115

55 Q. And where were you in the room at the time Mr. Fayerweather signed that paper?

A. I was standing at the foot of the bed.

56 Q. And what were you looking at?

A. I was looking towards the window at the side.

57 Q. But you saw him sign, you saw the signature?

A. Yes.

58 Q. Did you sign that paper in there?

A. Yes.

59 Q. And what did you rest the paper on when you signed it, what was it resting on?

A. It was resting on the bureau.

60 Q. On the bureau?

A. Beside the bed.

1116

61 Q. Before you signed that paper, who had told you that you would be wanted to be a witness to the paper?

A. Mrs. Reynolds.

62 Q. Had anybody else?

A. No.

63 Q. Mr. Vaughan had not said anything to you about it, had he?

A. No, I had not seen Mr. Vaughan.

64 Q. Did you know him then?

A. Yes.

65 Q. You knew him, but you had not seen?

A. No.

Elizabeth Rhodes Joyce

66 Q. And did you see these other two persons, Mr. Grout and Mr. Browning, sign at about the time you signed it?

A. Yes.

67 Q. And when Mr. Grout read this paper to Mr. Fayerweather, did he have more than one paper, did he read more than one?

A. Not that I remember.

68 Q. If he had had another one you would have seen it, would you not?

A. Yes.

1117

69 Q. He only signed one?

A. Yes.

70 Q. And so far as you know, he only read one?

A. Yes.

71 Q. Well, when you went out of that room, what became of Mr. Grout and Mr. Browning?

A. I do not know, I went right upstairs.

72 Q. No, but did they go out with you?

A. Yes, sir; they went out with me at the same time.

73 Q. Where?

A. Into the sitting room.

1118

74 Q. Who were in the sitting room when you got there?

A. Mrs. Fayerweather and Mr. Vaughan.

75 Q. While Mr. Grout was reading this paper to Mr. Fayerweather, you observed Mr. Fayerweather's appearance, did you, you noticed him, you looked at him, you saw him?

Mr. Blaikie: I will withdraw that question.

76 Q. What was Mr. Fayerweather's appearance while Mr. Grout was reading the paper to him, as to whether he knew what was going on, as to intelligence, what was his appearance as you observed it, did he seem to know what he was about or didn't he?

A. Well, he simply showed no signs, only as he nodded his head.

77 Q. Showed no signs of life other than that?

A. No, he just sat there in his bed.

By Mr. Sherman:

78 Q. Are you able to say whether Mr. Fayerweather appeared to be attending to Mr. Grout while Mr. Grout was reading this paper?

A. I am not, for this reason, I was looking towards the window while this paper was being read.

79 Q. You have had how much experience as a trained nurse, both in training and in practice since?

1119

A. I was in the hospital two years, and I have been out three.

80 Q. Since the death of Mr. Fayerweather?

A. Since the death of Mr. Fayerweather.

81 Q. And have you been constantly or nearly constantly occupied as a trained nurse since you left the hospital?

A. Nearly constantly, during the winters since I left the hospital.

82 Q. And have you seen a number of people in extremis, in their last hours, and have you seen them die?

A. Yes.

1120

83 Q. Where a person dies of a lingering disease, such as consumption, does your experience enable you to say whether they retain to the last their vigor, and their interest in worldly affairs, and their attention to business matters, are you able to say from your experience whether they do?

A. From my experience I should say no, they do not.

84 Q. That has been the result of your observation for the five years that you were so occupied since Mr. Fayerweather's death?

A. Yes.

85 Q. Has your experience with such sick people since then enabled you to form a judgment respecting Mr. Fayerweather in the light of that later experience?

A. He was not capable—

86 Q. Well, I ask you simply the fact first whether or no?

A. Yes.

87 Q. Judging from that experience and your observation of him and your previous knowledge of him, was Mr. Fayerweather, on the day of his death, on the day of the signing of this paper, on the 15th of November, 1890,

1121

in such a condition of body and mind as, in your opinion fitted him, and enabled him to listen to Mr. Grout's reading of that paper, so he was able to comprehend it, and comprehend its import, and its bearing and effect on his property and its disposition?

A. No.

By Mr. Blaikie:

88 Q. How did Mr. Fayerweather look to you while he was in the room, did he look to be in his usual health, or how?

A. He looked very sick and very weak.

1122

89 Q. And you spoke of it being a paper, did you know what kind of a paper it was at the time that you were signing it?

A. No.

By Mr. Sherman.

90 Q. Was Mr. Fayerweather's breathing easy or labored, at the time that Mr. Grout and the others were there?

A. Labored.

91 Q. Did he inflate his lungs with air easily or with difficulty?

A. With difficulty.

92 Q. Was he suffering from the effects of the disease, or was he at ease and without distress, which?

A. I do not think I understand your question.

93 Q. (Question repeated.)

A. From the effects of the disease.

94 Q. Did Mr. Fayerweather hear with difficulty or without difficulty at that time?

A. With difficulty, with great difficulty.

95 Q. And about his eyesight, was he able to read or write, without the use of magnifying glasses or spectacles at that time?

A. No.

96 Q. Do you know what his custom was as to the use of glasses, did he use more than one pair of glasses?

A. He used his ordinary eye glasses, and the magnifying glasses also.

1123

97 Q. And was there a particular magnifying glass that was at hand, whenever he had to read?

A. Yes.

98 Q. And where was that kept?

A. That was in the sitting room, always, on the table.

99 Q. Was there more than one table in the sitting room?

A. No.

100 Q. And was that table a table five feet long by three and a half, or such a matter?

A. I should say so.

1124

101 Q. With a drawer in it.

A. Yes, a large table.

102 Q. A heavy table, was it?

A. Yes.

103 Q. And coming to the 11th of November before his death, were you a witness to a paper drawn or brought there by Prescott Hall Butler on the 11th of November, 1890?

A. Yes, sir.

104 Q. When you came into the room on that occasion whom did you find there?

Elizabeth Rhodes Joyce

A. Mr. Butler and Dr. Wilcox and Dr. Vedder and Mr. Fayerweather.

105 Q. What was Mr. Butler doing at that time, was he reading the paper to him?

A. I think he was as I came into the room.

106 Q. And you were in the room when he was reading the paper to him?

A. Yes.

107 Q. Where was Mr. Fayerweather sitting, and where was Mr. Butler sitting on that occasion, while Mr. Butler was reading this paper to him?

1125

A. Mr. Fayerweather was sitting at one side of the table, and Mr. Butler was either at the other side, or at the end of the table.

108 Q. And in the middle of the room?

A. Yes.

109 Was there any small table that was taken to the other end of the room, away from the front of the house?

A. On that day?

110 Q. On that occasion.

A. No.

111 Q. And was the ink used in signing that paper upon that large table in the middle of the room?

A. Yes.

1126

112 Q. Where were the other persons in the room, other than Mr. Fayerweather and Mr. Butler, while Mr. Butler was reading the paper to Mr. Fayerweather?

A. I do not remember where they were.

113 Q. Do you remember where you were?

A. I think I was at one of the windows.

114 One of the front windows.

A. Yes.

115 Q. And about how far would that be, or was that from the table where Mr. Butler and Mr. Fayerweather were then sitting, half the length of the room?

A. Yes.

116 Q. Not more than half?

A. No.

117 Q. Did Mr. Butler, in reading the paper, speak in an ordinary tone or loud tone?

A. Just the ordinary tone.

118 Q. Did Mr. Fayerweather indicate in any way that he had difficulty in hearing it?

A. I do not remember that.

119 Q. Did Mr. Fayerweather appear to hear what Mr. Butler read on that occasion?

A. I do not remember exactly, I think Mr. Fayer-
1127

weather made some remark, indicating that he did not hear exactly.

120 Q. Was that more in the nature of an inquiry as to whether he correctly understood the paper?

A. Yes.

121 Q. And was Mr. Butler's response to that remark such as apparently to satisfy Mr. Fayerweather?

A. I think Mr. Butler re-read what he had read before.

122 Q. And then Mr. Fayerweather appeared to be satisfied?

A. Yes.

1128

123 Q. Was the reading done in such a tone that, at the distance at which you and the other witnesses were from Mr. Butler and Mr. Fayerweather, you could have heard what was read and stated, if you had attended to it?

A. Yes.

124 Q. Was there any secrecy about it so far as you and the other witness were concerned, so far as Mr. Butler or Mr. Fayerweather imposing secrecy was concerned?

A. No.

125 Q. Is there any fact which you can state, which explains your not being able to give the contents of that paper, except that you paid no attention to it?

A. No.

126 Q. That is the only reason?

A. Yes.

127 Q. In view of the construction and arrangement of that floor, how far from the table, in the middle of the sitting room can persons sitting at the table and talking in an ordinary tone of voice, be heard by occupants of that or adjoining rooms, if you have tested that?

A. I think an ordinary conversation can be heard in the back room, in the bedroom.

128 Q. Had you been apprised before the actual signing of this paper on the 15th of November, that some paper was to be signed and witnessed?

A. Yes.

1129

129 Q. And were also apprised that the doctors were to be witnesses with you?

A. Yes.

130 Q. And had you been told when that would be done?

A. The latter part of the afternoon, I understood it.

131 Q. Then this actual signing and witnessing was not in pursuance of the first arrangement?

A. No.

132 Q. And two of the witnesses who were to be with you, were not there at the time?

A. No.

1130

133 Q. Well, did this actual signing take place before the time which had been previously fixed for it, and for the arrival of the two doctors?

A. Yes.

134 Q. How much before?

A. About two hours.

135 Q. And do you know who is responsible for that change of the program?

A. Mr. Vaughan, I think.

136 Q. What leads you to say that, what fact?

A. Because Mr. Vaughan had attended to all the business, had done all the previous business about it.

137 Q. And had anything been done about it except in pursuance of his request or direction?

A. No.

138 Q. When you were introduced to Mr. Grout and to Mr. Browning, was anything said about their coming from Mr. Ritch's office.

A. No.

139 Q. Do you know, or so far as you know, did Mrs. Fayerweather or Miss Anner Amelia Joyce know that these gentlemen were there from Mr. Ritch's office?

A. Not that I know of.

1131

140 Q. Did you or the others know that anyone but Mr. Vaughan was the cause of these gentlemen being there at that time?

A. No.

141 Q. When these gentlemen went into Mr. Fayerweather's room, did you see the first of their meeting with him?

A. Yes.

142 Q. You went in preceding them?

A. Yes.

143 Q. Did anyone introduce them, or mention them by name, to Mr. Fayerweather?

A. Mr. Grout.

1132

144 Q. I do not quite understand?

A. Mr. Grout introduced Mr. Browning.

145 Q. Well, did Mr. Fayerweather, by his appearance or otherwise, indicate that he recognized either of them?

A. He simply nodded his head.

146 Q. He nodded his head. Was there any indication that he recognized either of them as people he had seen before?

A. Nothing more than that.

147 Q. Nothing but a nod?

A. That is all.

148 Q. Well, during that day, did he, so far as you know, indicate his ideas or wishes otherwise than by a nod?

A. I do not know.

149 Q. So far as you do know, did he?

A. No, so far as I know.

150 Q. Where did you last see Mr. Vaughan before you went into Mr. Fayerweathers's room with Mr. Grout and Mr. Browning on the 15th day of November, 1890?

A. I saw him some time during the morning in Mr. Fayerweather's house.

1133

151 Q. I mean immediately before, when last before going into the room with Mr. Browning and Mr. Grout, did you see Mr. Vaughan?

A. I saw him in the sitting room.

152 Q. Just before?

By Mr. Blaikie:

153 Q. You left him there?

A. I left him there.

By Mr. Sherman:

154 Q. And who was with him?

A. Mrs. Fayerweather.

1134

155 Q. And was he talking with Mrs. Fayerweather, apparently?

A. Yes.

156 Q. And when you came out again, where did you next see him?

A. He was still in the sitting room with Mrs. Fayerweather.

157 Q. Mrs. Fayerweather was still with him?

A. Yes.

158 Q. He was still talking to her?

A. Yes.

ELIZABETH R. JOYCE.

Sworn to before me this 2d day of April, 1899.

John A. Shields, *Examiner.*

Mr. Sherman: Complainants tender the witness for cross-examination.

Adjourned to Wednesday, February 8th, 1899, at 10 a. m.

New York, February 8, 1899.

Adjourned by consent to February 9, 1899, at 3 p. m.

New York, February 9th, 1899.

Met pursuant to adjournment.

Present: The Examiner, Mr. Blaikie and Mr. Granger, representing Mr. Root.

Adjourned to February 10, 1899, at 3 p. m.

1135

New York, February 10, 1899.

Met pursuant to adjournment.

Present: The Examiner, Mr. Blaikie and Mr. Granger.

Adjourned to February 14, 1899, at 3 p. m.

New York, February 14, 1899.

Adjourned by consent to February 15th, 1899, at 3 p. m.

New York, February 15th, 1899.

Met pursuant to adjournment.

Present: The Examiner, Mr. Blaikie and Mr. Granger.

1136

THOMAS M. MARSAC, called for further examination on behalf of the plaintiffs, testified as follows:

By Mr. Blaikie:

Q. Are you connected with the Surrogate's office?

A. Yes.

Q. What is your position there?

A. Clerk of the Records.

Q. You have been asked to produce a certain letter from Mr. Thomas G. Ritch to Morris B. Beardsley, dated December 13, 1890. Have you made search for such letter among the Records?

A. I have.

Q. Did you find any such letter?

A. No, sir; I did not.

Mr. Granger: No cross-examination.

THOMAS M. MARSAC.

Sworn to before me this 6th day of March, 1899.

John A. Shields,
Examiner.

Mr. Granger: I would like to have the record show that on February 8th Mr. Granger, in behalf of consel for Hamilton College, appeared and waited until 10:45, and

1137

no one appearing for the plaintiff, and that pursuant to notice served on counsel for Hamilton College, February 9th, Mr. Blakie for plaintiff and Mr. Granger for Hamilton College appeared, and pursuant to agreement adjourned to to-day at 3 o'clock.

Adjourned to Tuesday, February 14th, at 3 p. m.

New York, February 15th, 1899.

Met pursuant to adjournment.

Present: The Examiner and Mr. Blaikie.

Adjourned on account of the illness of Mr. Blaikie's witness, to February 16, 1899, at 3 p. m.

1138

New York, February 16, 1899.

Adjourned by consent to February 23, 1899, at 3 p. m.

New York, Feb. 23, 1899.

Adjourned by consent to February 25, 1899, at 3 p. m.

New York. Eebruary 25, 1899.

Adjourned by consent to February 27, 1899, at 2 p. m.

New York, February 27, 1899.

Met pursuant to adjournment.

Present: The Examiner, Mr. Sherman, Mr. Blaikie and Mr. Granger.

Mr. Granger: Mr. Sherman, did you get an extension of time?

Mr. Sherman: Yes.

Mr. Granger: For how long?

Mr. Sherman: March 6th. The order is on file.

1139

ANNER AMRLIA REYNOLDS, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct-examination by Mr. Sherman:

1 Q. Mrs. Reynolds, you are the wife of John B. Reynolds?

A. I am.

2 Q. I believe you were Mrs. Fayerweather's sister, were you not?

A. Yes.

3 Q. The widow of Daniel B. Fayerweather?

A. Yes, sir.

4 Q. And did you for a number of years reside in Mr. Fayerweather's house at No. 11 East 57th street in New York City?

A. Yes, sir. upwards of twenty years.

1140

5 Q. Your sister was an invalid for a long time before his death and hers?

A. Sixteen years.

6 Q. And did the cares and supervision of the household fall upon you?

A. Entirely.

7 Q. For how long before his death was Mr. Fayerweather afflicted with his fatal illness?

A. Four years.

8 Q. And during that time how much of it were you with him?

A. During all of the time.

9 Q. Was such attendance as was rendered to him done under your direct oversight and supervision, and by you sometimes?

A. Entirely; I was his only nurse.

10 Q. Do you know Mr. Thomas G. Ritch, one of the defendants here?

A. I do.

11 Q. What relation in general did he bear to Mr. Fayerweather towards the closing years of his life, was he his legal adviser?

A. Yes.

1141

12 Q. Was he in the habit of seeing Mr. Fayerweather frequently, so far as you know?

A. Well, sometimes quite frequently, and then there would be a long time that he would not see him.

13 Q. And did he ever come to the house to see him?

A. Yes, occasionally.

14 Q. No you know Mr. Henry B. Vaughan, one of the defendants?

A. Yes.

15 Q. How long, so far as you know, did his acquaintance with Mr. Fayerweather extend?

1142

A. Well, really I do not know how long Mr. Fayerweather had known him; I knew Mr. Vaughan since about 1880 I think.

Mr. Granger: I ask to have the last part stricken out as not responsive, beginning with "I knew Mr. Vaughan."

Mr. Sherman: Counsel for complainants states that the existing stipulation being expressly based upon the deferring of objections in order to prevent the interruption of the deposition, the taking of such objection is by him regarded as a waiver of the stipulation, and he will at the final hearing insist that it has been waived.

Mr. Granger: I understood—I just came into the case a few days ago, Mr. Sherman, and I understood that all objections as to form had to be taken at the time. Was not that right?

Mr. Sherman: I have not heard you state anything about form.

Mr. Blaikie; I think that is right, Mr. Granger.

Mr. Granger: Then I will withdraw my objection.

Mr. Sherman: Strike it out then.

16 Q. And did Mr. Fayerweather know him before that?

A. Yes, he went to Europe with Mr. Fayerweather in 1875, I think.

1143

17 Q. About a week before Mr. Fayerweather's death, did Mr. Fayerweather and Mr. Vaughan have an interview at Mr. Fayerweather's house which led to communication being made to Mr. Ritch on the subject of Mr. Fayerweather's then existing will and codicils, to your knowledge?

Mr. Granger: Objected to as to form.

A. Yes.

18 Q. State when that was and what you know of it?

A. It was a day or two before the 11th of November.

1144

19 Q. 1890?

A. 1890.

20 Q. As to what you know of it, tell all you know of it?

A. Mr. Vaughan came to the house to read to Mr. Fayerweather his will, and after reading it there was a great discussion between Mr. Fayerweather and Mr. Vaughan relating to the contents of the will.

21 Q. Before you get to that, at whose request did Mr. Vaughan read the will to Mr. Fayerweather?

A. Mr. Vaughan was sent for to come to the house to read the will, Mr. Fayerweather requested him.

22 Q. Through you?

A. Mr. Fayerweather requested me, in the early part of November, to write Mr. Vaughan asking him to come to the house at his convenience.

23 Q. Were you Mr. Fayerweather's amanuensis at that time?

A. Yes, sir.

24 Q. You wrote his letters for him?

A. Yes, sir, I wrote all his letters.

25 Q. And were you in the habit of reading to him the letters addressed to him which reached him?

A. Always.

1145

26 Q. Was there anything about his hearing or eyesight which called for that, and if so, what?

A. Mr. Fayerweather's eyesight after he had pneumonia was so impaired that he could not read at all; he could neither read the papers or letters, or anything at all.

27 Q. From about what time was that?

A. Four years before his death; and his hearing was also impaired, he grew quite deaf.

28 Q. Well, was it necessary to pitch your voice higher or increase the volume of it, or do anything out of the ordinary in order to enable him to hear you, and if so, what?

1046

A. I always sat quite near him and then I would enunciate very clearly in order to have him hear.

29 Q. And did you notice whether he watched the movement of your lips in order to enable him to hear you?

A. And he sometimes did that (illustrating).

30 Q. Put his hand up behind his ear?

A. Yes, sir, put his hand behind his ear.

31 Q. And under his direction you sent a communication to Mr. Vaughan to come and read his will to him?

A. I did.

32 Q. Where was the will at that time?

A. I had previously written to Mr. Ritch to bring the will to the house, and it was in an envelope in Mr. Fayerweather's pocket, hanging on the rack in his room.

33 Q. Were you present at the discussion between Mr. Fayerweather and Mr. Vaughan after the reading of the will?

A. Part of the time.

34 Q. Will you state what you heard them say each to the other?

1147

A. I was in an adjoining room and I heard a great excitement between Mr. Fayerweather and Mr. Vaughan, Mr. Vaughan was trying to make Mr. Fayerweather understand the contents of his will, which he could not bring to mind, could not make up his mind was so; and Mr. Vaughan said to him—this I heard distinctly as I came into the room, "If you were to die to-day, those two executors would get more than half of your fortune;" and they had quite an argument about it, and some very large strong talk.

35 Q. Well, I wish you would state everything that you heard on that subject, so far as you can recollect it.

A. And Mr. Vaughan said, "This man Ritch has written this, and he and Mr. Bulkley will come into possession of half your property, and I say this man, this Ritch, is a damned scoundrel."

1148

36 Q. What response did Mr. Fayerweather make to that?

A. He thought Mr. Vaughan was mistaken; that it could not be possible.

37 Q. What could not be possible?

A. That this was so?

38 Q. That the will was so.

A. He said, "This is not the original will, I want to see the original will, and see if those statements are correct."

39 Q. In consequence of that, did you write another letter to Mr. Ritch for Mr. Fayerweather?

A. Then I came into the room to hear this conversation, and as I retired, Mr. Vaughan called me and said, "I want you to come here a moment, because there is trouble over what Mr. Fayerweather has discovered in this will, I want you to write a note to Mr. Ritch and Mr. Fayerweather will sign it, you need not sign it." I came into the room and sat down by the side of the table opposite Mr. Fayerweather, and he dictated the note.

40 Q. Who dictated it?

A. Mr. Fayerweather, to Mr. Ritch, and I wrote it. Mr. Fayerweather signed it.

1149

41 Q. (Handing book.) Please look at the paper printed in the record in the Court of Appeals which has been identified by the defendant, the trustees of Hamilton College herein, at page 295, marked Exhibit J, and state whether that is a correct copy of that letter?

A. That is it.

Mr. Sherman: I read it in evidence.

"11 East 57th street.
November 13, 1890.

My dear Mr. Ritch:

1150

Will you please deliver to Mr. Henry B. Vaughan my original will, and the first, second and third codicils thereto, which have been kept in your possession, as I wish to examine them with him, in connection with the copies which you have furnished me.

Yours truly,
D. B. Fayerweather."

42 Q. What followed the writing of the letter, Mrs. Reynolds?

A. It was given to Mr. Vaughan.

43 Q. And did he return subsequently?

A. Is there a letter written previous to that, is there an exhibit of a letter written previous to that?

44 Q. By Mr. Vaughan?

A. That was dated the 13th.

45 Q. Well, there is another letter of the same date; did you write another letter of the same date?

A. Mr. Vaughan wrote a letter on the same date.

46 Q. For Mr. Fayerweather to sign?

A. For Mr. Fayerweather, not by Mr. Fayerweather's dictation, but he said he wrote the letter himself.

47 Q. On this same occasion?

A. Yes, sir, on this same occasion.

1151

48 Q. Look at the Exhibit K on page 297 of the same record and state whether that is a correct copy of the latter letter?

A. I am not correct in my statements there, those letters were written after the codicil of the eleventhh was executed, during another interview.

49 Q. Then you have made a mistake in the order of events?

A. I have.

50 Q. Well, we will try to straighten that out?

A. Those are the two letters.

1152

51 Q. Then on the occasion when Mr. Fayerweather got Mr. Vaughan to read the copy of his will, furnished by Mr. Ritch, after it had been read to him, what immediately followed as you remember?

A. Mr. Fayerweather and Mr. Vaughan had quite a long interview, and I came into the room several times, getting very nervous, feeling he would be too tired. Mr. Vaughan told me what he had discovered in the will, sometimes which reflected very much on Mr. Ritch, and there would have to be a new codicil made.

52 Q. Well, did he say that as coming from Mr. Fayerweather?

A. Yes, they agreed to that, and there was quite a consultation as to what lawyer should be employed to

write that codicil, it should not be a member of Arnoux, Ritch & Woodford's firm.

33 Q. What was finally decided?

A. Mr. Vaughan decided that as he termed it, his lawyer would be the one, that was Evarts, Choate & Beaman.

54 Q. And did Mr. Fayerweather agree to that?

A. He agreed to that.

55 Q. And then what happened in reference to that?

1153

A. And asked me if I knew any one in the neighborhood who knew Mr. Fayerweather sufficiently well to act as witness, that it would require three persons; and I said no, unless the two physicians, Dr. Wilcox and Dr. Vedder; and then I suggested my niece, Miss Elizabeth Joyce, who was in the house. He said that would do.

56 Q. Was any draft or memorandum as to the contents which should be in the new codicil, prepared, so far as you know?

A. Yes.

57 Q. State what the fact is in that respect, please?

A. They proceeded to make this draft, what Mr. Fayerweather wanted to do. It was drawn then and left at Mr. Fayerweather's house through mistake.

1154

58 Q. What became of it, do you know?

A. Mr. Vaughan going away hurriedly, left the will, and this draft with the will in an envelope, in the table draw of the sitting room. The next morning he sent his son to Mr. Fayerweather's house with a note, asking me to deliver him that memorandum. I asked Mr. Fayerweather about it, and he said, "I do not know, but if you will open that table draw, you will find an envelope with my will, you open that and examine the contents, and examine that and perhaps you will find it." I did. He asked me to read a portion of it to him for his identification, or he said, "Read it, and I will tell you if it is correct." I read a portion of it. He said, "That is

correct, you put that in an envelope, seal it and give it to Mr. Vaughan's son."

59 Q. Do you recall what it was you read?

A. I would rather not state, Mr. Sherman; if that is important, I could tell you, though.

60 Q. I think we had better take what you remember about it. Do you remember whose handwriting it was in?

A. It was in Mr. Vaughan's handwriting.

61 Q. And how many pages of it were there? Was it a single page or more?

A. It was on very long, legal paper.

1155

62 Q. (Handing paper.) That is what we call legal cap?

A. It was on a longer paper than that, unless it was joined together, and it was names and figures.

63 Q. Do you remember any of the names?

A. Mrs. Fayerweather's name appeared first.

64 Q. Well, any others?

A. My name.

65 Q. Any others?

A. Three nieces.

66 Q. Any others?

A. Yes, but I cannot recall the names as they were, I know I read those names.

1156

67 Q. Are there any other names that you can recall without taking them necessarily in the order in which they were there?

A. I heard several names called by Mr. Fayerweather to Mr. Vaughan when he was giving out this list, as to who he wished to give to.

68 Q. What names were those?

A. One name was the wife of my brother, Mrs. Harriet Joyce. Another name that he asked was the Rev. William Lloyd.

69 Q. Was anything said by Mr. Fayerweather at the time the memorandum for his new codicil was being prepared, in regard to Mr. Ritch, and if so, what?

A. Well, after the first stormy attack on Mr. Ritch, I think Mr. Fayerweather said no more to Mr. Vaughan about him at that time; there was a good deal said that first day when the will was read.

70 Q. Well, was anything said by Mr. Fayerweather as to Mr. Ritch, you have testified, I think, as to something said by Mr. Vaughan to Mr. Fayerweather, now was anything said at that interview by Mr. Fayerweather to Mr. Vaughan?

1157

Mr. Blaikie: You mean at the stormy interview?

Mr. Sherman: Yes.

A. I do not think I could say in Mr. Fayerweather's language anything, although he said something to me afterwards, but not to Mr. Vaughan.

71 Q. When first after this interview at which Mr. Vaughan read to Mr. Fayerweather the copy of his will, did Mr. Fayerweather say anything in your hearing about Mr. Ritch, and what did he say? Where first, the question is, and what did he say?

A. He said he had found something in his will which reflected very much upon Mr. Ritch's integrity. Previous to this when he asked to see his will and I had

1158

objected, thinking it would disturb him, objecting to him having anything to do with his will because I supposed it was all right, he said, "I have heard lately of Mr. Ritch doing crooked things, and I do not want to find a mare's nest in my will," and immediately after this he said to me, "I have found the mare's nest."

72 Q. On these previous occasions had any mention been made about Mr. Ritch, in connection with the Hoyt will by Mr. Fayerweather, and if so, what?

A. Well, when I asked him why he employed Mr. Ritch, he said because he had been Mr. Hoyt's lawyer, and they recommended him to him, and he had done

some business for other gentlemen, and also for Mr. Vaughan, and that he made a serious blunder, and he wanted to see if his will was all right.

73 Q. Well, had Mr. Fayerweather said anything in your hearing in reference to the contest over the Hoyt will?

A. No, sir.

74 Q. Well, this memorandum which was drawn by Mr. Vaughan, as you have testified, was followed by what action next, in reference to any will or codicil?

1159

A. He took the memorandum down town and returned, and said he would be at the house on the 11th, at 10 o'clock in the morning, to execute—to have the codicil executed.

75 Q. And did he come on the 11th?

A. And I engaged the doctors to come at that time, but it was—they were not there at that time, it was delayed a little later, I could not tell you the exact hour, I should think possibly—there was a delay about it, anyway; it was executed on the 11th, but not at the hour first named.

76 Q. Were you in the house at the time the people arrived who took part in the execution of it?

A. Yes, sir.

1160

77 Q. And who came first, if you remember?

A. The two doctors came about the came time.

78 Q. And then came?

A. My niece was there, and Mr. Butler came after I retired to the back room.

79 Q. Mr. Prescott Hall Butler?

A. Yes, I was not present, and I did not see him at all.

80 Q. Will you state the manner in which the front room on the second story of No. 11 East 57th street was furnished immediately prior to the arrival of Mr. Butler; to be more specific, how many tables were there in that room?

A. One large table in the center of the room.

81 Q. Any other table there?

A. Yes, two other tables, small tables filled with books.

82 Q. The large table in the middle of the room was about what size?

A. Well, that is pretty hard to tell.

83 Q. Well, with relation to this table for instance, was it about as wide as this table?

A. It was a library table.

1161

84 Q. Four feet by five and a half or so?

A. I should think so.

85 Q. Was it a heavy, solid table of some weight?

A. A solid table.

86 Q. Was it easy to move or not?

A. No, very heavy.

87 Q. Was there a drawer in one end of it?

A. Two.

88 Q. Two drawers?

A. Yes, sir, two drawers in either end.

89 Q. And was there anything in the room on that table?

A. Yes.

1162

90 Q. Was it in a drawer of that table that this envelope was placed, out of which you got the memorandum for Mr. Vaughan's son?

A. It was.

91 Q. How long after Mr. Butler departed were you in that room?

A. Immediately.

92 Q. Was there any change in the position of the furniture as between the time Mr. Butler came and the time he left?

A. Not at all.

93 Q. Was there any appearance of the middle table having been used for writing purposes?

A. Well, it is always there for that purpose, it is kept almost entirely for the use of writing, the inkstand in the center.

94 Q. How far from the front widows in that room is the table, as it then stood, I mean the table in the center, the writing table?

A. The center of the room, and the room is 21x22 foot square.

95 Q. The 22 foot is the north and south direction, is it?

A. Yes, sir.

1163

96 Q. And the table being in the middle, there would be something like 8 or 10 feet from the table to the front widows?

A. Yes.

97 Q. Is it easy or difficult for persons speaking in an ordinary tone or pitch of voice at that table to be heard by persons at the front windows?

A. Certainly you can hear distinctly if you are paying attention, if you care to hear.

98 Q. It would not then be a form of secrecy if people were standing at that front window, discussing things in an ordinary tone of voice at the table?

1164

A. There was no secrecy, and whenever Mr. Fayerweather's had anything confidential in that house, he had the room closed and was by himself. The doors were all open and his family were invited to be within hearing distance.

99 Q. Do you mean on that particular occasion?

A. On this particular occasion, me, for instance, in case he felt badly I knew what to do for him.

100 Q Did you observe any change in Mr. Fayerweather's strength or physical condition following upon the interview with Mr. Vaughan, and the execution of the codicil of November 11, and, if so, what change did you observe?

A. He was very nervous and excited, and I was obliged to give him his nervines about twice as often as I had been in the habit of doing, to keep him quiet.

101 Q. When, prior to his death, did it strike you that he was soon about to die, from his appearance?

A. I knew that he was failing very early Friday morning, but not until Friday night at midnight did I become alarmed about his condition.

102 Q. And what occurred then to alarm you particularly?

1165

A. He had been in the habit of laying flat, either on either side or on the back, with one small pillow, but I was obliged to put three and four pillows, very large pillows, in order to have him sit himself straight in bed he could not get his breath, and I was obliged to open the window wide, and give him constant attention, and became so alarmed that I was obliged to call his wife, I thought he was dying during the night, Friday night.

103 Q. When was the last occasion when he conversed with any freedom with those about him, how late prior to his death?

A. Friday.

104 Q. After that did he indicate his assent or dissent to what was said to him in any particular way?

1166

A. He answered questions put to him until Saturday morning, well, Saturday noon, I should say.

105 Q. Well, by speaking or some other form?

A. By speaking.

106 Q. And after that?

A. And after that by nod of the head.

107 Q. Judging from your acquaintance with him and your knowledge of his condition and his appearance, are you able to form any judgment as to how late during his life he clearly understood what was said to him?

A. I read some letters to him on Friday evening about eight o'clock; I read two letters to him; he understood them and made some remark about them; one was

from Mr. Ritch and one was from Mr. Vaughan.

108 Q. What did he say in reference to the letter from Mr. Ritch?

A. He remarked "Poor Ritch, he has gotten into trouble, but I will not see him."

109 Q. What had Mr. Fayerweather said prior to that time, if anything, in reference to his attitude or opinion of. Mr. Ritch?

A. He had said from the time of reading that will to me repeatedly, "If that man comes here, don't let him upstairs, the sight of him would kill me." And I would quiet him, saying, "You shall not see him."

1167

110 Q. Did Mr. Vaughan say anything on Saturday, in your hearing, in reference to the execution of a paper on that day by Mr. Fayerweather, and if so what did he say?

A. Will you please read that question again?

111 Q. (Question repeated.)

A. Mr. Vaughan was at the house on Saturday morning, Mr. Fayerweather had told me he would be there by appointment. I said to him, "I shall not let you see anyone to-day." He says, "If Mr. Vaughan comes here, I must see him." That was very early in the morning, before daylight. "I want you to give him

1168

that letter of Mr. Ritch," he had remembered reading it the night before. Mr. Vaughan came into the house as I was going out to go for the doctor. As he had not come at ten o'clock I became alarmed, and was going for him, in order to have a consultation that day.

112 Q. That is, you were going for the doctor?

A. For Dr. Vedder, to have him appoint a consultation with Dr. Janeway, and Mr. Vaughan came in as I was going out the door, and I returned with him to Mr. Fayerweather's room, and I left Mr. Vaughan there. I went to the doctor's and told him my fears about Mr. Fayerweather and when I returned, Mr. Vaughan left the room. Dr. Vedder came back with me.

113 Q. Let me ask you just here, about what interval of time elapsed between your leaving Mr. Vaughan with Mr. Fayerweather and your return with the doctor, and finding Mr. Vaughan there?

A. I left the house at ten o'clock, it could not have been more than half an hoor, I waited for the doctor.

114 Q. At his house?

A. At his house.

115 Q. And then came back with him?

A. I went for him with a coupe, and then I came back with him.

116 Q. Now, what did Mr. Vaughan say then?

1169

A. And Mr. Vaughan left the room, and the doctor examined Mr. Fayerweather, but at first asked him how he felt, and then directed all his remarks to me. He noticed the decided failure in Mr. Fayerweather, and he directed all his remarks to me; and when he was through with the examination, as he started to leave the room, he gave me a look that he wanted to speak to me.

117 Q. Who gave you a look?

A. Dr. Vedder, and I followed him, and he says, "Mr. Fayerweather will not survive the day; if he lives until night I shall be surprised."

118 Q. Was Mr. Vaughan there at the time?

1170

A. I said to the doctor, "Tell Mr. Vaughan." And he told me to be very careful in my manner, not to have Mr. Fayerweather at all suspect that I was alarmed; in that way, he said I could take better care of him and it would be better for the patient. He went into the front room and Mr. Vaughan was standing by the window in the room, and he told him, and Mr. Vaughan became very much excited, and said, "There is a paper that has to be signed to-day;" and the doctor said, "It is very cruel." He spoke of it being an outrage to ask a man in his condition to sign any papers; and he said, "It must be a very important paper to ask a dying man to sign it," and Dr. Vedder was very excited. Mr.

Vaughan says, "It is very important." And then he asked the doctors if they—he said, "Who can you have as a witness?" The doctor says: "Does it require a witness?" He says, "Yes, it requires two witnesses or three." I asked Dr. Vedder if he and Dr. Wilcox could act as witnesses if it was important that it was to be done. The doctor told him if it was to be done, it should be done as quickly as possible. Mr. Vaughan hurriedly put on his overcoat, and went back to the room and said to Mr. Fayerweather, "There is a paper to be signed," and Mr. Fayerweather lay in this condition and he opened his eyes wide, and he says, "Can't it be
1171
done Monday?" Dr. Vedder said then, "Mr. Fayerweather, if there is any papers to be signed, they must be done to-day," and there was a perfect ashy paleness come over Mr. Fayerweather's face; he then knew for the first time he was to die that day.

119 Q. Did Mr. Vaughan then leave the house?

A. Mr. Vaughan left the house in less than five minutes, as quickly as he could put on his overcoat.

120 Q. Did he return again that day?

A. Yes.

121 Q. About how long after leaving?

A. Before going, Dr. Vedder—I made the appointment with Dr. Vedder and Dr. Wilcox, that they should
1172
be there at four o'clock to witness the paper. Dr. Vedder appointed the time as being most convenient for him. Previously he had told me he did not think that Mr. Fayerweather would live until night, but he appointed the time at four o'clock to sign this paper. Mr. Vaughan left the house and returned between one and two.

122 Q. Who came with him?

A. I did not see him when he came, but two young men, Mr. Grout and Mr. Browning, from Mr. Ritch's office came with him.

123 Q. Did you know at that time that they were from Mr. Ritch's office.

A. I did not.

124 Q. Did anyone in the house, so far as you know, at that time know that they were from Mr. Ritch's office?

A. I knew nothing about it.

125 Q. Knew nothing about it.

A. No, sir.

126 Q. When did you first see them in the house?

A. After Mr. Vaughan left the house, I returned to Mr. Fayerweather at once, and as soon as he could collect himself he commenced talking to me, saying what he wanted me to do.

1173

127 Q. Mr. Fayerweather did?

A. I said to him, "Don't speak of it, don't say it, I cannot hear it." He said, "Now, don't deceive yourself, I am going to die." I said, "Oh, you shall not." He said, "Don't deceive yourself, you cannot deceive me, I shall die to-day, I heard what the doctor said." He then told me what he wanted me to do; and he said at all times he wanted me to call upon Mr. Vaughan, Morris Beardsley and Mr. Myrick for anything that I might want to know, that Mr. Myrick knew all about his affairs, and the others would give me all the information that I desired, because he had paid them for

1174

doing it, and I was not to offer them any money. He said he had given Mr. Vaughan $25,000, Mr. Myrick $25,000, and Mr. Beardsley $50,000, and I was to go to them for anything I wanted. He said, "I think Mr. Vaughan is my friend, I know Mr. Bulkley to be an honest man." Then there was a few other things he said to me about what he wanted me to do, he asked me to go and take a little rest and ask his wife to come to him; he wanted to talk with her, but after she came into the room he was not able to carry on any conversation at all.

128 Q. Did you first see Mr. Grout and Mr. Browning before or after they had been in Mr. Fayerweather's room?

A. I saw them as they were going down the stairs after having executed this paper.

129 Q. How much time had elapsed from your seeing them going down the stairs and your last previously having seen Mr. Fayerweather?

A. Well, I do not know how long it was. I went to this room to get a little rest, and—

1175

130 Q. And they came after that?

A. And recover myself, and left Mrs. Fayer weather and my niece with Mr. Fayerweather, and they were to call me in case they required me, but I was not called.

131 Q. Were you alseep in the meantime?

A. Oh, no, there was no sleep for me; I was resting.

132 Q. What is your best judgment as to the time that elapsed?

A. Well, I think it was about two o'clock in the afternoon that this paper was signed, and it was directly after that.

1176

133 Q. That you saw them go down stairs?

A. Yes.

134 Q. Well, I have not made my question clear. What I want to know is, how much time elapsed between your seeing Mr. Fayerweather and leaving him with his wife, as you have stated, and your seeing them go down stairs?

A. Probably an hour.

135 Q. At the time you saw him before seeing Mr. Grout and Mr. Browning going down stairs, can you judge whether Mr. Fayerweather's physical condition was such as to have permitted him sitting up in bed, putting his feet over the side of the bed, and taking

something—a paper—in his lap, signing his name and saying, "Pshaw, that is a poor signature," or "a pretty signature for a man to make?"

A. I could positively swear that Mr. Fayerweather could not have done anything of the kind. It was utterly impossible.

136 Q. Prior to that time had he then up to a certain period been given massage treatment?

A. Yes, sir.

137 Q. When was that discontinued?

A. Friday night.

1177

138 Q. Do you know why it was discontinued?

A. Because the massagiest said that he was too weak, it would do him more harm than good.

139 Q. At the time you last saw him before seeing Mr. Grout and Mr. Browning going down stairs, was Mr. Fayerweather able to sit up without assistance?

A. He could not move himself without assistance?

140 Q. At that time was Mr. Fayerweather able to see to write his name without glasses?

A. Mr. Fayerweather had not written his name excepting to sign some paper, why for months.

141 Q. Well, he signed the paper on the 11th of November, it seems?

1178

A. He would sign it with a very strong glass, or sometimes he put on two glasses, but he always had a magnifying glass there, right on that table. He could sign his name but not without—oh, he did sign his name, of course, he signed his name frequently to papers, but his eyesight was so that he could not write.

142 Q. When he did sign his name did he use this magnifying glass to guide him in placing his name on the papers?

A. I do not known that he always did that. I have seem him do it sometimes.

143 Q. Did he have spectacles whenever he wrote his name for the latter part of his life?

A. He had two or three pairs of spectacles that the optician said were the strongest that could be furnished, and that is why Dr. Vedder got this magnifying glass for him.

144 Q. In addition to those?

A. In addition to those.

145 Q. Was that glass or were any spectacles with him in the bedroom that day, November 15th, 1890?

A. I do not know that, because I was not there. The spectacles were usually left in the library in the drawer that was for his private property, the drawer of the library table.

1179

146 Q. By the library you refer to this room in which Mr. Butler and the others were on the 11th of November?

A. Yes, sir; all papers belonging to Mr. Fayerweather were kept in that drawer.

147 Q. Now about where he was on the 15th, was that in the room north of the library, in the northerly part of the house on the second story?

A. Yes, sir.

148 Q. Do you know the bed on which he lay on that occasion?

A. Do I know the bed?

1180

149 Q. You know the bed, do you, as it was made, and the height of it from the floor?

A. It was a very low bedstead.

150 Q. Is it possible for anyone of Mr. Fayerweather's height to have sat up in that bed and have turned around and put his feet over the side of the bed without having his feet touch the floor?

A. I think it would be quite impossible for him to do that thing.

151 Q. Well, you remember how tall Mr. Fayerweather was, and when sitting naturally, what would be the effect, would his feet touch the floor?

A. Certainly. Mr. Fayerweather was not able to move his limbs.

152 Q. I know, but I assume in that question a version of this affair which has been given which is referred to elsewhere. When did you next see Mr. Fayerweather after seeing Mr. Grout and Mr. Browning going down the stairs?

A. I went immediately to his room.

153 Q. In what condition did you find him?

A. I found him gasping for breath and not able to say anything, his eyes closed.

154 Q. How long or how soon after that did he become apparently conscious again and communicate with you?

A. From that time?

1181

155 Q. How soon after that?

A. Not at any time conscious after that.

156 Q. No?

A. Until about four or half-past four in the afternoon, it was after the gas was lighted, it was the first time he opened his eyes to speak to anyone.

157 Q. And what did he say then?

A. He said—opened his eyes very wide, Mr. Vaughan was sitting by the side of the bed, he looked at me and he said, "What is Vaughan doing here?" I said that he was coming this way "and came in to see how you were." He says, "Oh, no, he has heard I was going

1182

to die to-day, that is why he is here. Vaughan go out of the room and out of the house." He waved his hand like that, and then he said to me as I stood by the side of him, "I wa-want to-to t-tell you something—I c-a-n-'t"—that was the last words he ever spoke. That was the last time he opened his eyes.

158 Q. Did Mr. Vaughan immediately go upon being so addressed by Mr. Fayerweather?

A. He left the room and Mr. Fatherweather's eyes followed him as far as he could in the passageway, and then he said that to me and I never, to my dying day, will forget the look he gave me. He wished to say something to me about that man and he could not say it.

159 Q. Were you in California with Mr. Fayerweather in March before his death?

A. We went in March and returned in May.

160 Q. While he was in California did he attempt to write a letter to Mr. Romaine?

A. Yes, sir.

161 Q. Do you remember the occurence?

A. Mr. Romaine was constructing the tomb in Woodlawn, he was the architect; and I had written some letters to him about it, and always would break down and feel so badly that Mr. Fayerweather decided to never

1183

ask me to do a thing of that kind again; and Dr. Vedder came to me while we were in Pasadena one morning, and Mr. Fayerweather was in the writing room trying to write a letter, and he said, "Mr. Fayerweather is in there trying his best to write a letter and he cannot write it, he cannot see, he is very much troubled, and he won't let me write it." He said to me, "If I were you I would go to him," and I went to him.

162 Q. You went to Mr. Fayerweather?

A. Yes, I went to Mr. Fayerweather and I asked him what he was trying to do; he said, "I am trying to write a letter to Mr. Romaine, I cannot have the heart to

1184

ask you to do it." I said, "I will do it, I can do it perfectly well, I won't break down." And I wrote the letter for him, it was the directions about the tomb, the construction of it. He dictated it and I wrote it. He had written—torn up two or three pieces of paper that he had tried to write and could not write it, could not see; that was his last attempt to write a letter. That was the last of March.

163 Q. Are you able to say whether Mr. Fayerweather was able to say on November 15th, 1890, whether the penmanship of his signature was good or bad?

A. No, he could not see it. Mr. Fayerweather's eyes showed him dying in the early morning, they were

glazed, he could not have seen anything in the way of writing or printed matter, or anything of the kind.

164 Q. So far as you know, was the execution of the so-called codicil of November 15th, 1890, in Mr. Fayerweather's room without any knowledge of the inmates of the household except Miss Joyce, your niece, that it was going on?

A. Neither Mrs. Fayerweather nor myself knew it. Mr. Fayerweather previous to his telling me in the morning in his conversation that he had left us in the hands of these men, I asked him if his matters were

1185

made straight as he wanted to have them regarding his will, and he said yes, as far or as near right as he could make them.

165 Q. Did he ever say anything to you after Mr. Vaughan read his will to him as to his desire to make another will?

A. Yes.

166 Q. What did he say in that respect?

A. He said he ought to tear up the entire will and make a new one, but he was not equal to it, and Mr. Vaughan assured him that it could be patched up just as well.

1186

167 Q. Now, in additiou to the letter, Exhibit J of November 15, 1890, which has been read in evidence, you say there was another one prepared on the same day by Mr. Vaughan?

A On November 13th?

168 Q. Yes.

A. Yes.

169 Q. Now, please look at page 297 of the Court of Appeals' record previously identified, and state whether the letter, Exhibit K, found there is a correct copy of that letter?

A. This?

170 Q. Yes, this whole letter?

A. That letter was written by Mr. Vaughan, signed by Mr. Fayerweather.

Mr. Sherman: I offer it in evidence, Exhibit K. It isas follows:

"11 East Fifty-seventh Street, N. Y. City.
November 13, 1890.

Mr. Thomas G. Ritch:

Dear Sir: I have examined my original will, and the first, second and third codicils thereto, handed by you to Mr. Vaughan at my request.

By the tenth article of my will I left my residuary
1187
estate to my executors in trust to be equally divided among certain corporations and institutions.

By the first codicil, it seems that I have revoked this tenth article of my will, and then made the following disposition of my residuary estate:

'III. All the rest and residue of my estate of whatsoever character and wheresoever situated the same may be, of which I shall die possessed and remaining after the provisions of the first nine paragraphs of my will have been fully complied with and carried into effect, I give, devise and bequeath to Justus L. Bulkley and Thomas G. Ritch, named in the eleventh paragraph of my said will, to them and their heirs forever.

1188

Please advise me at once, in writing, what is the legal effect of this clause, and to whom and how would my residuary estate go in case of my death, supposing this first codicil to remain in force.

Yours truly.
D. B. Fayerweather."

171 Q. Mrs. Reynolds, in reply to that letter was any received from Mr. Ritch?

A. Yes, sir.

172 Q. Do you know what became of the original?

A. Why, I have seen it—well, it was produced in Court when I was on the stand.

173 Q. And is that the last you have seen of it?

A. That is the last I have seen of it.

174 Q. State whether the copy, Exhibit L, on page 298 and page 299 of the Court of Appeals' record is a correct copy of it?

A. That is right.

Mr. Sherman: I offer it in evidence, Exhibit L. It is as follows:

"Arnoux, Ritch & Woodford.
William H. Arnoux,
Thomas G. Ritch,
1189
Stewart L. Woodford,
Haley Fiske,
C. N. Bovee, Jr.,
William C. Wallace.

18 Wall Street, New York,
November 14th, 1890.

D. B. Fayerweather, Esq.,

Dear Sir: The intention of the change in question was to enable Messrs. Bulkley and myself to carry out the intentions of the will as modified by the various private memoranda in my possession. Neither Mr. Bulkley nor myself would have any moral right to treat any portion
1190
of your estate otherwise than as we know would conform to your wishes. I suggest that I call on you with these, and if still approved by you, that they be left in a sealed package with Miss Joyce or anyone named by you. The legal effect of the clause question is to vest the title to the residuary estate in Messrs. Bulkley and myself, but, as I have said, neither Mr. Bulkley nor I would wish to derive any personal benefit under this codicil.

Yours truly,
Thomas G. Ritch."

175 Q. Did you receive yourself from Mr. Ritch about the same time a personal letter referring to this subject?

A. I received a letter from Mr. Ritch on Friday evening.

176 Q. And where is the original of that letter, if you know?

A. I do not. I saw it in the Court room.

177 Q. But not in your possession or control?

A. It was in my possession, but some one the day Mr. Fayerweather died took it out of the drawer in our sitting room and it was produced in the Court. Mr. Vaughan had it.

178 Q. And it has not since been in your control?

1191

A. Never.

179 Q. State whether the copy on page 302 and 303 of the same record, Exhibit O, is a correct copy of that letter?

A. Yes, that is correct.

Mr. Sherman: I offer it in evidence, Exhibit O, It is as follows:

"New York, November 13th, 1890.

My Dear Miss Joyce—I have had two long talks with Mr. Vaughan to-day and yesterday, and I fear Mr. Fayerweather is worrying over his business matters. Mr. Vaughan says that Mr. F. is too ill to be seen, and so I would be glad to have you say to him, if you think it

1192

well, that I will execute any paper or say anything in your presence, or in that of any one else that will enable him to feel that his wishes will be"—partly written and erased, what seems to be the letters c-o-m-p-l, as if the writer had started to write "complied with" and changed it—"carried out to the letter. It would be a misfortune indeed to me to lose his confidence after so many years, through any misunderstanding now. The will and codicils provide carefully for the institutions in which he was interested and for the relatives and friends to whom he was attached, and I know that, at the time the papers were drawn, the reasons for each paragraph were

considered and approved by him, the object being to prevent any contests.

I write thus freely to you, because you have known of Mr. Fayerweather's affairs, and I believe that you, as well as he, believe that I have only tried to do my duty.

If at any time you or Mr. Fayerweather would like to see me, I will call.

Sincerely yours,

Thos. G. Ritch."

180 Q. Did you attend the trial of the contest in the Surrogate's Court over the admission to probate of the codicils of Mr. Fayerweather's will?

1193

A. Yes, nearly every day.

181 Q. Did you have a conversation with Mr. Henry B. Vaughan during the progress of that contest in or near the Surrogate's Court?

A. Mr. Vaughan had a conversation with me.

182 Q. State what transpired on that occasion?

A. It was after the session of the Court; nearly every one had left the Court room. Dr. Irwin was there with me. Just as we had started to leave the Court room Mr. Vaughan said very abruptly, "Miss Joyce, I want to speak to you." I stepped to one side and he said, "I am

1194

going to fight this thing just as long as there is a dollar left of the Fayerweather estate or as long as I have a dollar of my own private fortune. I want you to tell Mrs. Fayerweather that, have her understand that." At the same time he shook his fist in my face and it brushed my cheek.

183 Q. Did you tell Mrs. Fayerweather of this occurrence?

A. I did.

184 Q. What did she say, what was the effect upon her?

A. It made her very ill. I said to her that I never would go into the Court room to be insulted by the man

who should have been our best friend, and she said that perhaps we had better settle that matter, even if we got nothing, we could not be dragged into Courts to be insulted that way. She became very ill and it was necessary for the doctor to increase his visits and the doctor said I ought not to have told her, and I was very much alarmed myself for the effect it had on her.

185 Q. Did you know of her signing the papers containing the agreement to withdraw the contest and also the releases subsequently, in view of that, did you?

A. I did, yes.

1195

186 Q. Are you able to say whether at the time she signed those papers, or any of them, she was in her normal condition of strength and firmness of mind or otherwise?

A. I think her mind all the time was clear; Mrs. Fayerweather had no trouble that way.

187 Q. No, but as to her resolution, her firmness of resolution?

A. Oh, yes.

188 Q. Was that or was it not shaken by these events?

A. Well, I knew that she became very nervous and worried and feared that she should never get money enough to pay her bills and decided that she had better settle, and thus get some money to pay what she owed.

1196

189 Q. Well, during the time of this contest from the time of Mr. Fayerweather's death until the execution of the releases, what was her condition in regard to money affairs?

A. She had no money. She had less than one hundred dollars by her when Mr. Fayerweather died. There were no bills paid until after she signed the releases. Mr. Fayerweather's funeral expenses, all the grocery bills, for the servants—she borrowed money of a friend to pay her servants, and she had no money to pay any bills, she simply was living on her credit.

190 Q. Did she say anything to you to indicate wheth-

er her signing these papers, these releases, was an exercise of choice on her part or the reverse or otherwise?

A. No, it was not. She said, "Vaughan says that he will spend the entire fortune, and he has it in his power to do it. I have nothing, there will nothing come to me, and if they will give me that I had better take it, I cannot help myself."

191 Q. On the Saturday of Mr. Fayerweather's death was he during the morning continuously conscious?

A. No, he was not.

192 Q. What lapse from that condition, if any, occurred? Can you describe his condition?

1197

A. Well, in talking with me after Mr. Vanghan left him, he would say a few words and close his eyes and then after an interval of a few minutes he would try again and say some more; but at the same time his story was not at all connected.

193 Q. Was that a change from his previous use of his mind and talk?

A. Yes, sir; Mr. Fayerweather had a remarkably quick thought and in saying anything or doing anything he was a man of few words and very concise in anything that he said, and he said it very plainly, with as few words as possible.

1198

194 Q. Did you say that on the Saturday his conversation was not consecutive?

A. Not consecutive.

195 Q. Do you mean that it was not coherent?

A. Well, a man in that condition, dying, his lungs filled, you can imagine what it is, struggling for breath and trying to say his last words to his family—

196 Q. Do you mean that his mental operations were interrupted by his physical struggles?

A. Possibly I—

197 Q. Is that the way you saw it?

A. I think his brain was as clear as possible for a man to be in his dying condition; but I think Mr. Fayer-

weather cared very little for the things of this world except separation from his family when he knew he was *going; I don't think his mind* was on disposing of his property, or things of that kind; he was not that kind of a man.

198 Q. Was anything said by Mr. Fayerweather at the time Mr. Vaughan read his will to him, in regard to that provision of the legacy to you, which provided for that legacy so long as you remained unmarried, and if so, what?

A. I heard a remark which I did not at that time

1199

understand. I understand fully now. I heard Mr. Fayerweather say in a very excited manner, "I never did it, I never did it, that girl has given her life for me." I know now what it meant.

199 Q. While this memorandum which was taken away to be given to Mr. Butler was prepared, was it possible for you if you had paid attention to have heard it all?

A. It was possible for me to have heard it all, and there was not the slightest objection to my hearing it all, and it was possible for me to read every word of it and Mr. Fayerweather would not have objected.

1200

200 Q. Well, he did not object, did he?

A. He did not object.

201 Q. And he knew you were there and could hear it?

A. Yes.

202 Q. And his instructions to Mr. Vaughan occurred under those circumstances?

A. Yes, there was nothing secret or private about the construction of that codicil; there was not a closed door.

203 Q. Who was it that made the arrangements for witnesses to come at four o'clock to witness the paper on November 15th, 1890?

A. I asked the doctor at the time that he told Mr. Vaughan—Mr. Vaughan told him there was a paper to

be executed—I asked the doctor if he would not engage Dr. Wilcox.

204 Q. Was that in Mr. Vaughan's presence?

A. That was in Mr. Vaughan's presence, but not in Mr. Fayerweather's presence; it was in the sitting room.

205 Q. What, if anything, was done when Mr. Browning and Mr. Grout came in reference to the engagement previously made with Dr. Vedder to witness the paper?

A. Well, before I knew of it at all—in fact, I never thought of it again until after Mr. Fayerweather's death—but Mr. Vaughan sent our colored butler to Dr.
1201
Vedder to say his services would not be required. I knew nothing of it.

206 Q. While Mr. Fayerweather was in the condition you have described following the departure of Mr. Browning and Mr. Grout, did Mr. Vaughan say anything in his presence about burning any paper, and if so, what did he say and what happened?

A. He said to me in the sitting room, I passed through from one room to another, of course I was in attendance on Mr. Fayerweather, he said—

207 Q. You were in attendance on Mr. Fayerweather?

A. Yes, and I passed through the sitting room and he was there.
1202

208 Q. Who was there?

A. Mr. Vaughan was there, and Mr. Vaughan said, "I want you to go with me to the kitchen fire and burn a paper," and I said, "I cannot go now, Mr. Vaughan," and he said, "Well, as soon as you can." I went back to Mr. Fayerweather and attended to him, and when I could, in a few minutes, I came back and I said, "What did you want?" and he followed me back into the room and said, "Mr. Fayerweather"—he put his hands into his pocket and took out an envelope, it was in a long envelope, and held it up and said "Mr. Fayerweather, do you want this paper destroyed?" He never opened his eyes but nodded his head. He was sitting as straight as I am now. And

Vaughan said, "Do you want Miss Joyce to destroy it?" and he nodded his head the same as he answered every question during the day; whether he meant yes or no, it was by a nod.

209 Q. And what was done with the envelope?

A. He said, "This paper, I want—"

210 Q. Who said?

A. Mr. Vaughan.

211 Q. You went with him afterwards—

A. I went with him down to the kitchen fire and Mr. Vaughan took the lid from the range, took this envelope from his pocket and said, "put that envelope into the fire," and I did it.

1203

212 Q. Do you know what was in the envelope?

A. I do not.

213 Q. Was it possible for either Mr. Fayerweather or yourself to know what was in it?

A. It was never mentioned to Mr. Fayerweather or to me either; it was not possible for us to know.

214 Q. Did you hear Mr. Vaughan testify upon the trial of the will contest in the Surrogate's Court?

A. I did.

215 Q. And did you also hear him testify on the trial of what we call the Five Colleges action before Judge Truax?

A. Yes.

1204

216 Q. Did you hear Mr. Vaughan give an account of the destruction of that paper while he was a witness on the stand in either of those trials?

A. The first time I knew what the paper was—

217 Q. Well, did you, first?

A. Yes.

218 Q. You did hear it?

A. Yes. The first time I knew the paper destroyed was the codicil of the 11th, was when he was asked in Court what became of this paper; he said "burned by Miss Amelia Joyce."

219 Q. And have you just stated the circumstances attending its burning, if it was burned?

A. Yes, that is all there was to the burning if it was burned.

220 Q. Did he state on the witness stand whether it was burned by Mr. Fayerweather's direction?

A. I do not remember that. I was so shocked—

221 Q. Did Mr. Fayerweather give any other direction on the subject except what you have just stated?

A. He never spoke a word, he did not even open his eyes.

1205

222 Q. And how long after that question was asked him by Mr. Vaughan to which he nodded in reply was it when he ordered Mr. Vaughan from the room, as you have stated?

A. Oh, I could not give you the exact time, but quite an interval between that time and the other.

223 Q. Was the house so constructed that it would have been possible or convenient to have destroyed that paper in Mr. Fayerweather's presence?

A. Certainly, there was an open fireplace at the foot of his bed where he could have seen it.

224 Q. Was there anything more necessary than to touch a lighted match to the paper to burn it in that room?

1206

A. Nothing, it was an open fireplace. Mr. Fayerweather in his life insisted that every paper, every letter, should be destroyed in his presence. He never allowed me even to pass into another room to destroy one of his papers, but said, "Do it here, where I can see it."

225 Q. Mrs. Reynolds, when did you or Mrs. Fayerweather, to your knowledge, first know that a codicil to Mr. Fayerweather's will had been executed on the day of his death, and by what means did you learn it?

A. Not until—we never realized it until we saw it in the papers, published in the daily papers.

226 Q. Was the will and were the codicil read in your presence at any time after Mr. Fayerweather's death, and if so, when?

A. Immediately after their return from the funeral from Woodlawn, it was read in the dining room.

227 Q. At 11 East 57th street?

A. At 11 East 57th street.

228 Q. Did Mr. Ritch have any conversation with you just prior to the reading of the will?

A. He did.

229 Q. You and he alone?

1207

A. In the parlor, he called me into the parlor and said to me that there was a provision in the will regarding my annuity if I married, I was not to receive it after I married, and he said that—I asked him if Mr. Fayerweather directed that and he said no, but when he read the will to him he presumed it escaped his notice. At the time he wrote it he did not know men or did not know what relation I was to Mr. Fayerweather; "but as I understand the case now, I know Mr. Fayerweather could not have understood it when I read the will to him." He told me that Mr. Woodford—as long as he lived I should have that annuity, even if I married to-morrow, "and if I should die, Mr. Woodford has charge of my affairs and he will see that you have it."

1208

230 Q. Did he state how he came to put it in the will?

A. He said it was a customary way of drawing a will when you give annuities that way.

231 Q. Well, did he read that clause in the will when he read the will afterwards before the people?

A. He said, "Now to spare your feelings I will not read that clause." He was very considerate.

232 Q. And he did not read it?

A. He did not read it.

233 Q. Did he leave out anything else in reading the will and codicils when they were read on that occasion?

A. No, I think not—I don't know what he left out, I don't think really my sister or myself understood that will at all, we were feeling too badly to care or know what was in the will. And he read it and took it away with him.

234 Q. Did you receive from Mr. Ritch on or about the 13th of November a letter containing a suggestion that Mr. Ritch should call on Mr. Fayerweather?

A. Yes.

1209

235 Q. Look at the Court of Appeals' record previously identified and at page 818, and state whether that is a correct copy of that letter?

A. Yes.

236 Q. Except—I suppose—was it signed Thomas G. Ritch or T. G. Ritch?

A. Thomas G. Ritch, I believe, that is the way he used to sign his letters.

Mr. Sherman: I offer that letter in evidence, as follows:

"Arnoux, Ritch & Woodford,
18 Wall Street, N. Y.

1210

November 13, 1890.

My dear Miss Joyce—I have had two long talks with Mr. Vaughan Friday and yesterday, and I fear Mr. Fayerweather is worrying over his business matters. Mr. Vaughan says that Mr. Fayerweather is too ill to be seen, and I would be glad to have you say to him, if you think it well, that I will execute any papers, or say anything in your presence, or in that of any one else, that will enable him to feel his wishes will be carried out to the letter. It would be a misfortune, indeed, to me to lose his confidence after so many years through any misunderstanding now. The will and codicils provide carefully for the institutions in which he was interested, and for the relatives and friends to whom he was attached, and I know that at the time the papers were drawn the reasons for each paragraph were known and approved by him,

the object being to prevent any contest. I write this to you because you have known Mr. Fayerweather's affairs, and I believe that you as well as he believes that I have only tried to do my duty. If at any time you or Mr. Fayerweather want to see me, I will call.

Sincerely yours."

237 Q. Did you on or about the same date receive from Mr. Vaughan a letter reporting his interview with Mr. Ritch?

A. I did.

1211

238 Q. Look at the Court of Appeals record previously identified at page 821, and state whether this is a correct copy of that letter?

A. Yes, that is right. It was signed "Hall & Vaughan."

Mr. Sherman: I offer that letter in evidence. It is as follows:

"Hall & Vaughan,
Hides and Leather,
1212 18 Ferry Street.

New York, Nov. 13, 1890.

Dear Miss Joyce.—Will you please explain to Mr. Fayerweather that I have obtained the letters from Mr. Ritch. At first, Mr. Ritch stated that he would take the papers to Mr. Fayerweather, but I reminded him that the letter read to give them to me, and he said he would do it. He grew, however, as white as the paper upon which I am writing. I will deliver the second letter to-morrow. There is, however, but little use in this, and I am convinced from his manner that Mr. Ritch knew exactly what he was doing.

Truly yours,

Hall & Vaughan."

239 Q. When were these letters last in your possession or control?

A. They were in my possession until Saturday morning when I gave Mr. Ritch's letter to Mr. Vaughan; the other one was on the sitting room table, and when I went to look for it it was gone.

240 Q. You mean the Saturday morning the day of Mr. Fayerweather's death, November 15th, 1890?

A. Yes, and it was afterwards found in Mr. Vaughan's possession.

1213

241 Q. And since that time they have not been in your custody or control?

A. No.

242 Q. Did you hear Mr. Vaughan testify on those trials or either of them in regard to some memorandum made by him under Mr. Fayerweather's direction on the Saturday morning of his death, the day of his death?

A. I did, a writing on an envelope or letter?

243 Q. Yes.

A. I did.

244 Q. What according to your recollection did Mr. Vaughan then and there testify on that subject?

1214

A. Well, I could not repeat Mr. Vaughan's words, I have never read it, I simply heard it in the Court and it is a long time ago, I could not remember it, but I simply know that there was a memorandum written on an envelope.

245 Q. So Mr. Vaughan said?

A. Yes, purporting to be Mr. Fayerweather's dictation.

246 Q. For the codicil of November 15, 1890?

A. No, it was not shown in Court.

247 Q. No, but as a basis for the codicil, which he claimed was to be drawn on November 15, 1890?

A. Yes. If Mr. Fayerweather knew anything about that codicil, he was the best actor I ever knew.

248 Q. So far as you know, did any such event ever occur?

A. No, I knew nothing about it. It was done, probably, if it was done at all, when I was at the doctor's.

249 Q. Was Mr. Fayerweather during the time you were away at the doctor's to get him to come quickly—I think you said?

A. Yes.

250 Q. Was Mr. Fayerweather then in a condition to have enabled him to have dictated any further details or disposition of his estate to Mr. Vaughan?

1215

A. I should think not, but what he might have done in my absence, I could not swear to.

251 Q. To the best of your judgment was he able have done such a thing?

A. His condition was such that he ought not to have been asked questions of such a nature. I don't know what he might have done.

252 Q. Was he in such a condition that any such action could originate with him?

A. No.

253 Q. I do not mean whether Mr. Vaughan could not have spurred him to do anything, but as a voluntary action on his part, was he in a condition that he could have done it?

1156

A. I don't think it could have been possible, but I would not like to swear to what was done when I was absent. Mr. Fayerweather took no nourishment after Friday night of any kind; he could not swallow until he stopped breathing; we moistened his lips and that was all that was done for him; he took no medicine or nourishment.

Mr. Sherman: You may cross-examine.

Mr. Granger: Counsel for Hamilton College declines to cross-examine, because the testimony is irrelevant.

ANNER A. REYNOLDS.

Sworn to before me this 4th day of March, 1899.

John A. Shields,
Examiner.

Adjourned to February 28th, 1899, at 2 p. m.

New York, February 28th, 1899.

Adjourned to March 1st, 1899, at 2 p. m.

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New York, March 1st, 1899.

Adjourned to March 2d, 1899, at 2 p. m.

New York, March 2d, 1899.

Adjourned to March 3d, 1899, at 1 p. m.

New York, March 3d, 1899.

Met pursuant to adjournment.

Present: The Examiner, Mr. Blaikie and Mr. Granger.

1218

JOHN C. BAYLOR (colored), called as a witness on behalf of the complainants being duly sworn, testified as follows:

Direct-examination by Mr. Blaikie:

1 Q. What is your name?
A. John C. Baylor.
2 Q. During Daniel B. Fayerweather's lifetime, did you know him?
A. Yes, sir.
3 Q. Were you at any time in his employ?
A. Yes, sir.
4 Q. When and where?
A. 11 East 57th street.

6 Q. In what capacity were you employed?

A. I was butler and valet to him.

7 Q. For how long a time were you so employed?

A. About six months.

8 Q. Were you employed at the time of his death, November 15th, 1890?

A. Yes, sir.

9 Q. Did you serve him with any food that day?

A. No, sir.

10 Q. Why not?

A. He was too weak to take food.

1219

11 Q. Do you know Henry B. Vaughan?

A. Yes, sir.

12 Q. How long have you known him?

A. I got acquainted with him soon after I went to Mr. Fayerweather's.

13 Q. Did you see him at Mr. Fayerweather's house on the day Mr. Fayerweather died?

A. Yes, sir.

14 Q. Was he there little or much that day?

A. He was there a great part of the day.

15 Q. A great part of that day?

A. Yes, sir.

1220

16 Q. Did you talk to him or did he talk to you?

A. No, sir.

17 Q. Did he ask you to do anything or say anything to you?

A. He gave me a message to take to Dr. Wilcox and Dr. Vedder.

18 Q. What time of day?

A. Between two and three o'clock.

19 Q. Was it in writing or verbal?

A. Verbal message.

20 Q. What did he tell you?

A. He told me to tell Dr. Vedder and Dr. Wilcox that their services would not be needed that afternoon.

21 Q. What did you do after he told you that?

A. I went up and delivered the message.

22 Q. To whom?

A. To Dr. Vedder.

23 Q. At that time or about that time did you know Mr. Fayerweather's condition?

A. I knew that he was very weak.

24 Q. What was he doing was he sitting up?

A. He was lying propped up in bed.

25 Q. In his bed?

A. Yes, sir.

1221

26 Q. Do you know whether there was any paper signed that day by Mr. Fayerweather?

A. I do not; I heard of a paper being signed afterwards.

27 Q. But you did not know anything about it?

A. No, sir.

28 Q. In the Surrogate's testimony, Edward M. Grout has sworn, on page 501, these words, he says that at the time it is claimed Mr. Fayerweather signed a paper on his dying day in his bedroom, which paper he claims was a codicil to his will, he says this, "when I reached the place in the codicil where the sentence occurs, 'in witness thereof I have hereunto set my hand and seal,' Mr. Fayer-

1122

weather raised himself from the pillows, drew his feet out beside the bed, and was seated on the side of the bed just as I am seated on this chair, except that his feet did not touch the floor." Now, could Mr. Fayerweather at that time raised himself from his pillows?

A. No, sir.

29 Q. Could he have drawn his feet out beside the bed?

A. No, sir.

30 Q. Could he have sat upon the side of the bed without help?

A. No, sir.

31 Q. Now, then, you know the bed he died in, do you?

A. Yes, sir; very well.

32 Q. How high was the part he lay on from the floor?

A. Well, I should say about a foot and a half to two foot, including the mattress and all.

33 Q. You say about a foot and a half to two foot?

A. Yes, sir; that is from the top of the bed, the mattress, to the floor.

34 Q. Well, if he had sat on it would his feet have touched the floor or not?

A. His feet would have touched the floor.

35 Q. Could not have helped touching the floor?

A. Could not have helped touching the floor.

1223

36 Q. You were in and out of the room that day?

A. Yes, sir.

37 Q. A good deal, were you?

A. Yes, sir.

38 Q. What was his position in the bed that day?

A. Lying half propped with two or three pillows under his shoulders and head.

39 Q. So that it brought his his body up?

A. Yes, sir; kind of high, it was not level.

40 Q. Mr. Grout has testified on page 502, "he raised himself at the point where his signature would come in the codicil." From what you saw of him on that day, could he have raised himself at all?

1224

A. No, sir; he had not raised himself for several days prior to his death without assistance.

41 Q. During that day of his death were his eyes open or closed most of the time?

A. His eyes were closed during the time that I saw him, or most of the time that I saw him.

42 Q. How did he breathe?

A. He breathed very difficultly.

43 Q. Had difficulty on that day. Did you hear him speak while you were in his room?

A. No, sir; I did not.

44 Q. If he had spoken you would have heard him, would you not?

A. Yes, sir.

45 Q. What was your service or duty there with him?

A. I gave him baths and assisted him in dressing and lifted him and rolled him from one room to another when it was necessary.

46 Q. Rolled him in what?

A. In a wheel chair.

47 Q. And on that day did you roll him or was he in the chair at all?

A. No, sir.

1225

48 Q. And would it have been possible for him, during the last two days of his life, to have done what I have read to you that Mr. Grout said he did on the afternoon of the day he died without help?

A. No, sir; it was impossible.

49 Q. How was his eyesight the last few days of his life?

A. His eyesight was very poor.

50 Q. Could he see to read or write without glasses?

A. No, sir; he generally wore two pair of glasses to read or to look at anything, and also had a large, what do you call it, a magni—

1226

51 Q. Magnifying glass?

A. Yes, sir.

52 Q. You knew of that?

A. Yes, sir; I know when he got it.

53 Q. And he had to have two pair of glasses and a magnifying glass to see to read, you say?

A. Yes, sir.

54 Q. And how was his hearing?

A. His hearing was very poor, and especially at different times, I do not know whether the weather affected him or not.

55 Q. Well, the last day or two of his life, how was his hearing then?

A. It was very poor.

56 Q. Did you have to speak louder than ordinary?

A. Yes, sir.

57 Q. Was his hearing poor a good while before his death?

Yes, sir.

58 Q. How long back should you say?

A. Well, I should say a year or more.

Mr. Blaikie: You may cross-examine.

1227

Mr. Granger: We decline to cross-examine on the ground that we deem the evidence to be irrelevant.

JOHN C. BAYLOR.

Sworn to before me this 4th day of March, 1899.

John A. Shields, *Examiner.*

Adjourned to March 4th, 1899, at 2 p. m.

New York, March 4th, 1899.

Met pursuant to adjournment.

Present: The Examiner, Mr. Blaikie and Mr. Granger.

1228

WILLIAM BLAIKIE, re-called for further examination on behalf of the plaintiff, testified as follows:

The Witness: I look at page 281 of the Appeal Book from the General Term and I find that the record states correctly what occurred in the trial in this respect: Mr. Ritch was asked on page 281, folio 1123, "Q. Did you draft or take part in drafting the original will of Mr. Fayerweather which has been put in evidence? A. Yes.

On page 283 of that record he was asked, folio 1129, "Please look at the paper which I now hand you, dated October 6th, 1884, and signed D. B. Fayerweather. State whether you have ever seen that paper before." He answered, "I have seen it." "Q. In whose handwriting is it? A. In mine. Q. Do you mean that to apply to

the signature as well? A. No, sir; signature is Mr. Fayerweather's." That is correctly stated.

On page 284 Mr. Ritch was asked, folio 1136, "Q. Please look at the first codicil to Mr. Fayerweather's will which has already been put in evidence, and state whether or not that was drafted by you?" He answers on page 285, "I think so." That he states correctly.

On page 286 he was asked, "By Mr. Root: Was this envelope and the paper enclosed ever in your custody? A. From the time I received it until Mr. Fayerweather's death, with the exception possibly of a day or two in March, 1889." That he states correctly.

1229

Mr. Granger: I presume that the question is whether those records are correct, and that is the form of the question and your answer for each is that is it true?

Mr. Blaikie: I state that the record correctly states what he has testified. I read the question and answer and state that it correctly states it.

The Witness: On page 305 the witness, Mr. Ritch, was asked, "Q. Mr. Vaughan came to your office on the day after you delivered to him the letter of November 14, 1890, which is marked 'Exhibit L' together with the private memorandum to which you refer in the letter,

1230

and requested that the codicil—the further codicil—be prepared of the tenor of this instrument, this fourth codicil; is that the fact? A. I think so. Q. You saw him, did you not, yourself? A. I saw him, yes. Q. It is then your recollection; you say you think so? A. I was in a hurry to get away, he gave full instructions, or whether I, after talking with him a few minutes, took him into Gen. Woodford's office, and left him with him, I don't remember. Q. When you say you think so, I ask you if that is your recollection? A. That is my recollection." That is substantially what was testified to by Mr. Ritch in regard to that point at that time, and that time was January 24th, 1894.

On page 315 Mr. Ritch was asked, "Q. Have you read the complaint in this action? A. I don't think I have. I have read part of it, but I don't think I took it and read it through. Q. Have you read that portion of it which charges that there was given by you to Mr. Fayerweather a promise or assurance that you and Mr. Bulkley or you, Mr. Bulkley and Mr. Vaughan, would appropriate and apply the residuary estate to carry out the intentions of the will as expressed in the tenth paragraph, except as modified by certain private memoranda? A. I read that. Q. Did you ever give Mr. Fayerweather any such promise or assurance? A. I never did." That is substantially a correct statement of what Mr. Ritch swore to then.

1231

On page 327 Mr. Ritch was asked, "Q. Did you ever represent to Mrs. Fayerweather that you and your co-executors held this residuary estate of Daniel B. Fayerweather upon a trust for the benefit of any colleges or other institutions or corporations? A. I don't remember that I did. Q. Did you ever so represent to Mrs. Achter or Miss Emma S. Fayerweather? A. I don't remember. Q. Did you not insist and claim that you held that property absolutely, you and your co-executors, to do with as you pleased? A. I did; whenever it was asked." That states in substance correctly what Mr. Ritch swore to at that time.

1232

On page 328, Mr. Ritch was asked. "Q. Did you ever since the death of Daniel B. Fayerweather represent, directly or indirectly, to his widow, Lucy Fayerweather, or to his nieces Mrs. Achter or Miss Emma Fayerweather" (it should be Miss Emma S. Fayerweather) "that you and your co-executors took this residuary estate upon a trust for the benefit of any benevolent, charitable, literary, scientific, educational or religious or other corporations, societies or associations? A. I never did." That states in substance correctly what Mr. Ritch swore to at that time.

On page 331, Mr. Ritch was asked, "Q. Didn't you and your co-executors, from the time of making and delivering that deed, represent and claim to all parties interested in the estate that you had an absolute right to give the property as in that instrument provided? A. We did." I state that the deed referred to there was the deed of gift which was known by that name in this suit. He was then asked, "Q. Did you explain directly or indirectly to Mrs. Fayerweather or Mrs. Achter or Miss Emma S. Fayerweather their rights in this estate under Sections 1 and 2 of Chapter 360, Laws of 1860, in respect

1233

to bequests and devises to institutions? A. No, sir." I state that that correctly states in substance what Mr. Ritch swore to at the time in regard to the matters there referred to.

On page 355 of that record was offered in evidence a paper which was marked Exhibit 9, January 25th, 1894, and in folio 1422 of it occurs this passage, "and we also agree to execute to her a deed of the lot in Woodlawn Cemetery intended for the remains of Mr. Fayerweather." That states correctly in substance that portion of that exhibit that I call attention to, described in folio 1422.

1234

Upon page 362 of that record, Mr. James said, "That is what I meant to ask him (referring to Mr. Ritch) and he said at least $5,000,000. Then upon page 263, "By the Court: t was at least that amount? A. It was at least that amount." That states substantially correctly what Mr. Ritch swore to on that point in that place and at that time.

Upon page 425 of that record Mr. Haley Fiske was asked, in folio 1700, "Do you remember that on the 25th of February a copy of the deed of gift was produced openly before the Surrogate, exhibited to the counsel for the contestants and marked for identification in the case? A. I remember everything except the date; independent of the record I would not remember the date." That

states substantially correctly what was sworn to by Mr. Fiske at that time on that point

On page 410, the question was asked, "Q. Do you remember that on the 18th of February the Surrogate announced from the bench his decision to admit the will of Mr. Fayerweather to probate? A. I do not remember the date. I remember the announcement. I can tell by looking at the record in the suit." That states substantially what was asked and replied to on that point.

Mr. Granger: Is that the same witness?

Mr. Blaikie: Yes.

1235

The Witness: On page 508, folio 2029, Mr. Vaughan was asked, "Did you also have the draft of the codicil at that time? A. I believe they were all in the one envelope. Q. Had you got them from the safe deposit, where you had put them after the execution of the 11th, to take up to the house that day? A. Yes, sir. Q. Did you show them to Miss Joyce? Did you show her the codicil of November 11th? A. The contents of them. Q. Yes. A. Oh, no. Q. Did you inform her of the contents? A. No, sir. Q. Did you inform her of the nature of the papers that were in the envelope? A. No, sir. Q Did she, so far as you have any knowledge on the

1236

subject, know what those papers were, or what the contents of them were? A. So far as I know she did not. Yes, she knew that was the codicil that was signed on that day, the 11th. Q. How did she know that?" That question was not answered. "Q. Did you not testify before the Surrogate as follows to these questions, 'Q. And the envelope and all was put in the fire? A. Yes. Q. And to this day she has no personal knowledge of what was in that envelope, has she? A. I don't know that she has. Q. Well, she couldn't have, could she? A. I don't think she could.' Didn't you give those answers to those questions? A. I do not remember. Q. Will you testify that you did not? A. I will not testify,

other than I don't remember. Q. And to your best recollection, did you give those answers before the Surrogate? A. I have no recollection of giving that evidence. Q. Were not those answers true to those questions? A. If I gave that evidence at that time, I believe them true at that time." That is substantially, correctly what was said at that time on that point.

Page 515, Mr. Vaughan was asked, "Q. Now, did you ever tell Judge Rollins that either Mrs. Achter or Mrs. Emma S. Fayerweather was entitled to any portion of the Fayerweather estate in addition to the legacies given to

1237

them by the will and codicils? A. Not that I recall. Q. Did you ever tell Judge Beardsley so? A. Yes. Q. You say you did? A. Yes, sir. Q. When? A. I don't remember when. Q. What month? A. I cannot recall the month. Q. Where was it? A. I do not know where. Q. What did you tell Judge Beardsley they were entitled to besides the legacies under the will and codicil? A. I told him of this $100,060. Q. What $100,000? A. In that paper which you had. Q. Think a moment. I asked you if you told Judge Beardsley that Mrs. Achter or Mrs. Emma S. Fayerweather— A. You asked me whether Mrs. Beardsley. Q. Oh, no. A. I beg your

1238

pardon, then. I misunderstood you. Q. Then you correct your answer to no. A. To no, as far as Mrs. Achter or Mrs. Fayerweather are concerned. I thought you had gone by that. Q. But you did tell Mr. Beardsley of the $100,000, in this paper, Exhibit W? A. Yes, sir; and showed him the paper. Q. And showed him the paper? A. Yes, sir. Q. And wasn't that soon after Mr. Fayerweather's death? I cannot give you the date." That states correctly, in substance, what Mr. Vaughan swore to at that time in regard to that matter.

On page 672, Mr. Ritch was asked the question, "Q. I show you a letter dated December 13th, 1890, and ask you if that letter is in your handwriting? A. Yes, sir.

Q. Did you send that letter to Judge Beardsley at or about the time of its date? A. I did. Mr. James: I offer this letter in evidence. Mr. Parsons: Will you state that you produce it from the files of the Surrogate? Mr. James: Yes, I do. Letter read in evidence by Mr. James, as follows:"

I would state here that the custodian of all such papers in the Surrogate's office has been here and has testified before the Examiner in this proceeding that he has made diligent search and been unable to find any such letter. This letter reads as follows (it is marked Exhibit J 15):

1239 "Private,"

"Arnoux, Ritch & Woodford,
18 Wall Street,

New York, December 13, 1890.

Dear Judge: In kindness to Mrs. Fayerweather and Miss Joyce they ought in some way to be informed of the existence in my possession of a prior will much less favorable to both of them than the present, and with no discretion whatever to the executors—$800 per year to Miss J., and the income of $300,000 to Mrs. F., in addition to real estate.

Trust estates for life to the daughters of William Fayerweather except $25,000 to Mrs. Beardsley.

1240

It is a delicate position for me, and so I put you in possession of this information with liberty to use it as you deem proper.

Sincerely trusting Mrs. Fayerweather may see the hopelessness and unwisdom of a contest with those who desire to be her friends,

I am very truly yours,

Thomas Ritch."

Then the witness states:

"The Witness: I think there is a mistake in your reading at one place." "Q. If you will point it out. I read it as well as I could reading the writing. A. It is

right. Q. Whom do you mean in that letter by Miss J.? A. Miss Joyce. Q. Miss Amelia Joyce, now Mrs. Reynolds? A. Yes, you read the letter correctly. Q. And where you use the expression here Mrs. F., whom do you mean? A. Mrs. Fayerweather. Q. The widow? A. Yes, sir." That letter was marked Exhibit J 15. That states in substance correctly the contents of that letter and what took place in regard to it at that time.

I produce the transcript of the Surrogate's Record in the will contest of Mr. Fayerweather, and it appears on page 499 that Mr. Edward Marshall Grout testified as follows, the date over it being February 18th, 1891:

1241

"By Mr. Arnoux:

Q. How long prior to the 15th of November, 1890, did you know Mr. Fayerweather? A. Something over five years.

Q. Will you please state what occurred in connection with your witnessing the fourth codicil on the 15th day of November, 1890, beginning with matters at the office? A. I was sitting in my room which adjoins General Woodford's room, the door being open between, where Mr. Vaughan was present with General Woodford. General Woodford called to me and asked me whether I

1242

could go uptown to attend the execution of the will. I said I could, and he directed me to get another witness to go with me, stating, I believe, that there was a witness at the house. I was not then informed whose will it was or anything further than what I have stated. I called Mr. Browning; Mr. Browning had not had his lunch, and I sent him out to get it and told him to come back at once. About half past one, Mr. Vaughan, Mr. Browning and myself started for Mr. Fayerweather's house. On reaching the house Mr. Vaughan left Mr. Browning and myself in the parlor. Q. Wait a moment. Before you got to the house, on the way up with Mr. Vaughan, did you know what this paper was, or did you make any ex-

amination of it? A. I did, I had been talking in some general conversation with Mr. Vaughan, and then I asked him about the paper. I took the paper which General Woodford had given me and read it. I had not previously read it, and having read it I talked over the provisions of the statute as to the formalities of the execution, with Mr. Browning who had never been a witness to a will before. Q. Well, proceed. A. Mr. Vaughan left Mr. Browing and myself in the parlor and went up stairs, and in the course of five minutes or so came down again and took us up to the second story, front room. In that room

1243

was sitting Mrs. Fayerweather, Miss Joyce and Miss Elizabeth Joyce, to whom Mr. Vaughan introduced Mr. Browning and myself. I had never met them before. I then asked if everything was ready, and was told that it was. After Mr. Browning, Miss Joyce and myself went through the open passageway into the back room where Mr. Fayerweather was lying on his bed. As I entered the room Mr. Fayerweather nodded to me, a nod of recognition, and I drew a chair to the bedside and opened the codicil. Q. Before you opened the codicil did you introduce Mr. Browning to him? A. I don't know. I think I did introduce him, but whether I did introduce him at that time or later I can't remember. I read the codicil

1244

through and sat by the side of the bed. Mr. Fayerweather's bed was parallel to the windows, and was about six feet I think from them. I drew a chair by the head of the bed and was sitting here (witness explains with his hands) while reading the codicil to Mr. Fayerweather. Q. When you say 'here' suppose you describe the position so that the stenographer can take it? A. Mr. Fayerweather was on my right facing me and I facing him, and the distance between his head and mine was probably in the neighborhood of two or three feet, perhaps three feet. I read the codicil, Mr. Fayerweather was not lying flat in bed but propped with pillows. I read the codicil over from the beginning to end, that is to the end of the at-

testation clause. Mr. Vaughan had previously given me in the front room the original will and the other codicils. When I reached the point where the codicil refers to the tenth clause, I think that is the number, in the original will, I discontinued reading the codicil and opened the will at that clause and there read that clause through, or read the substance of it to Mr. Fayerweather, Mr. Fayerweather interrupting me by saying, 'yes, yes, I know' or something or that sort. When I reached the place in the codicil where the sentence occurs, 'In witness whereof I have hereunto set my hand and seal' Mr. Fayerweather

1245

raised himself from his pillows, drew his feet outside the bed, and was seated on the side of the bed just as I am seated in this chair, except that his feet did not touch the floor. Q. Did you assist him in any way to take that position? A. Not in the least, I did not touch Mr. Fayerweather with my hand at any time. I don't think I ever even shook hands with him. Q. Will you please repeat what it was that Mr. Fayerweather said when you reached the tenth paragraph of the will? Give the substance of it. A. To the best of my recollections Mr. Fayerweather, when interrupting my reading said the words, 'yes, yes, I know' or something to that effect, indicating his knowledge of what I was attempting to ex-

1246

plain to him. Q. Did you aid or offer to aid Mr. Fayerweather to rise at that time? A. I did not, when Mr. Fayerweather was rising I was still reading and continued reading so that my attention and hands were occupied by holding the paper. He raised himself at the point where his signature would come in the codicil. When I finished the attestation clause I took from a small table which stood by the window a book, and handed it to Mr. Fayerweather. Q. One moment. Did you make any suggestion to Mr. Fayerweather that he should rise? A. I did not. Q. Or did any one? A. No one to my knowledge. Q. It was his voluntary act, was it, at the time you had reached about the close of the codicil itself. A. It was.

I reached a book from the table, and handed it to Mr. Fayerweather and he laid it in his lap, or placed the codicil on the book open at the place where he would sign. Miss Joyce dipped a pen in the ink, she having brought a pen and ink from the other room and handed it to me, and I handed the pen to Mr. Fayerweather and he took it and signed his name. Q. No, did you in any way guide his hand? A. I did not. Q. Did you suggest to him where he should put his hand to sign? A. I don't recollect where I pointed at the place opposite the seal or not, but I should probably do so. Q. Did he of

1247

his own motion put his hand down to the place where he should sign? A. He did. Q. Now go on? A. Mr. Fayerweather while writing, or in the midst of his writing, made some sign, or used some word—I don't distinctly recollect which, indicating that. Mr. Rollins: State what he did. (Continuing.) I don't remember what he said, except it was 'pshaw' and in connection with what he said, afterwards. I drew a certain inference from that. Q. He said 'pshaw' or something of that character? A. Yes. Q. An ejaculation? A. Yes. By the Surrogate: Q. What was he doing? A. While writing—while writing his name. Upon finishing writing his name he complained about the poorness of

1248

his signature. By Mr. Arnoux: Q. What were his words? A. His words: 'That's not a very good signature.' I told him it was good enough, that if only it was his mark, that it was sufficient. I asked him the statutory questions in regard to acknowledging and publication of the will. I asked him if that was a codicil to his will, and if he signed, sealed and declared it, and if he wished Mr. Browning and Miss Joyce and myself to act as witnesses, and to all this he replied in the affirmative. Q. Do you remember whether he replied by words or simply by a nod? A. I do not. Q. Now proceed. A. I had entirely cleared the small table at the window from the books, and moved that table to the bedside, so that

the table was standing close to the bed, within two or three feet from Mr. Fayerweather, and placed a chair before it. Mr. Browning stood towards the foot of the bed, Miss Joyce seated herself on this chair, and signed her name and residence. Then Mr. Browning did likewise, and I signed last. Q. Was Mr. Fayerweather still seated, or did he resume a recumbent position? A. He had resumed his recumbent position after signing, before we signed as witnesses. Q. Did anybody assist him in returning to his recumbent position? A. Nobody assisted Mr. Fayerweather at any time during my presence
1249
in the room. Q. Did his feet still hang over the bedside when he returned, did he draw his feet in there? A. He drew them in just as he had put them out before. Q. Now proceed. A. I know nothing further in relation to the execution. Q. After the paper was signed what was done with it? A. I took the paper in my hand and the other papers also, all four of the other instruments, and with Mr. Browning and Miss Joyce returned to the front room where Mr. Vaughan, Mrs. Fayerweather and Miss Joyce had been during the time that we were in the back room. Mr. Browning then asked me if I should want him any further, and I told him no, and he
1250
left. Q. Did you notice whether the doors between the front room and the bedroom were open during the time of the execution of the papers? A. The doors were open and it was a wide passageway. After Mr. Browning left, I seated myself at the table in this library, Mrs. Fayerweather being seated directly opposite me, and Miss Joyce and Mr. Vaughan on my left. I laid the will and the first three codicils on the table by my hand, and took my pen from my pocket and indorsed the codicil as it is now indorsed. Q. Who brought the ink back from the bedroom? A. I think Miss Joyce brought it back. She brought it in there originally. Q. And then that being done, what did you do with the original

papers? A. I handed the five original papers to Mr. Vaughan in that room and departed. Q. Were they handed to him in the presence of Miss Joyce and Mrs. Fayerweather? A. They were; I left Mr. Vaughan in that room. By the Surrogate: Q. By Miss Joyce—which Miss Joyce? A. By Miss Joyce. I mean Miss Amelia Joyce, the elder Miss Joyce. By Mr. Arnoux: Q. When you returned to the sitting room did Miss Lizzie Joyce return with you? A. Yes. Q. Did she remain in the sitting room as long as you were there? A. I think so; I don't recall distinctly. Q. When you left the room

1251

they remained in the room? A. Yes. Q. You are certain that Miss Amelia Joyce and Mrs. Fayerweather did? A. Yes and Mr. Vaughan. Q. When, as you say, you had indorsed all these papers, you say you delivered them to Mr. Vaughan? A. I delivered the papers to Mr. Vaughan. Q. You did that in the presence of all the others? A. Yes, sir. Q. And then you left?. A. Yes, sir. Q. Mr. Grout, you recollect the exact language used in your introduction to Miss Lizzie Joyce? A. I do not, except that it was an introduction and that's all. Q. Were you also introduced to Mrs. Fayerweather? A. It was a general introduction to all the ladies in the room. I think Mr. Vaughan simply repeated my name and Mr.

1252

Browning's and then the names of the different ladies—not a separate introduction to each one. Q. Had you ever seen Mrs. Fayerweather before? A. No, sir. Q. Or Miss Amelia Joyce? A. No, sir. Or Miss Lizzie?. A. No, sir. Q. Who was it that responded when you asked the question whether everything was ready? A. My recollection is that I addressed the question to Mrs. Fayerweather, and that Mr. Vaughan and Mrs. Fayerweather both responded in the affirmative. Q. Did you say 'ready for what' in that question? A. I did not. I simply asked if everything was ready. Q. Was any other business transacted or any other conversation held while you were in the room? A. There was some general

conversation in the room while I was indorsing the codicil, but I don't recollect anything of what it was. Q. I mean prior to the execution of the codicil? A. No, sir. Q. And was this conversation that you heard in the room after the execution of the codicil a business or a general conversation? A. It was a general conversation, that is my impression. I have no recollection as to what it was. Q. Was any business of any character or the execution of any paper other than this codicil spoken of while you were there? A. Not in my hearing. Q. Or was any other business transacted while you were there? A. Not
1253
that I could see or hear. Q. When you were in the bedroom with Mr. Fayerweather prior to reading the paragraph of the will, where had you placed the will? A. I had the other papers all in my hand, holding them in one hand while I had the codicil open between the two. Q. And afterwards, when you came to the execution of the codicil, what did you do with these papers? A. I don't remember; I may have put them in my pocket or laid them on the table. Q. You don't remember which? A. No, I don't."

Adjourned to Monday, March 6th, at 2 p.m.

1254

New York, March 6th, 1899.

Met pursuant to adjournment.

Present: The Referee, Mr. Sherman, r. Blaikie, and Mr. Granger.

WILLIAM BLAIKIE, re-called for further examination, testified as follows:

The Witness: I produce and identify printed Surrogate's Record, and on Page 672, record of the probate proceeding on the last will and codicils of Daniel B. Fayerweather, deceased, it appears that Henry B. Vaughan was interrogated and answered as follows: 'Q. And it was in an envelope? A. Yes. Q. And the envelope and all was put into the fire? A. Yes. Q. And to this day she has no personal knowledge of what was in that envelope, has she? A. I don't know

that she has. Q. Well, she couldn't have, could she, A. I don't think she could."

Mr. Sherman: Counsel for complainants withdraws and moves to strike out from the testimony taken herein on the 4th day of March, 1899, the testimony at page 395 beginning with the words "The Witness," and ending on page 395 with the word "correctly." And also on page 396, the following question and answer, to wit, "Q. Did you ever give Mr. Fayerweather any such promise or assurance? A. I never did.

1255

The Witness: I also produce the record from the General Term, Court of Appeals, page 550, the Decree of the Surrogate admitting the will to probate, dated February 25th, 1891, as follows: See. Vol. IV, pages 230 and following.

The Witness: Also the decree of the Surrogate commencing upon page 554 bearing date March 24th, 1891, and admitting four codicils to probate as follows: See Vol. IV, page 234.

The Witness: I produce and identify the printed transcript of the Surrogate's proceedings on the probate contest of the will of Daniel B. Fayerweather, page 492, and read the following statement:

JOHN PRENTISS BROWNING, a witness on behalf of the proponent, having been duly sworn, testified as follows:

SURROGATE'S COURT

1256 CITY AND COUNTY OF NEW YORK

In the matter
of
Proving the Last Will and Testament of DANIEL B. FAYERWEATHER, deceased, as a Will of Real and Personal Property

City and County of New York, ss.:

J. Prentiss Browning, of 80 Clinton Place, New

York City, being duly sworn as a witness in the above entitled matter and examined on behalf of the applicant to prove said will, says: I was acquainted with Daniel B. Fayerweather at the time of the execution of the paper purporting to be a codicil to his will and before his death. I knew the above named decedent. The subscription of the name of said decedent to the instrument now shown to me and offered for probate as the fourth codicil to his last will and testament and bearing date the 15th day of November, in the year one thousand eight hundred and ninety, in the presence of myself and

1257

Elizabeth R. Joyce and Edward Marshall Grout, the other subscribing witness. At the time of such subscription, the said decedent declared the said instrument so subscribed by him to be a codicil to his last will and testament, and I thereupon signed my name as a witness at the end of said instrument at the request of said decedent and in his presence.

The said decedent at the time of so executing said instrument was upwards of the age of 21 years, and in my opinion of sound mind, memory and understanding, not under any restraint or in any respect incompetent to make a will. I also saw said Elizabeth R. Joyce and Edward Marshall Grout, the other subscribing witnesses,

1258

sign their name as witnesses at the end of said codicil to such will, and know that they did so at the request and in the presence of said decedent.

J. PRENTISS BROWNING.

Witness sworn and examined before me this 8th day of December, 1890.

Bernard J. Tinney,
Asst. to the Surrogate,
N. Y. Co.

The Witness: My testimony this afternoon in reference to her inability to know what the contents of the envelope were which Mr. Vaughan had testified to refers to the envelope of Mrs. Anner Amelia Reynolds, who was then Miss Anner Amelia Joyce, and the contents of the envelope referred to have been described or referred to in my testimony herein. I refer to the testimony of Mr. Vaughan quoted upon page 400 of my testimony herein, taken, March 4th, 1899.

Mr. Granger: I ask that the record state that complainants formally close the taking of testimony under
1259 the within issues.

WILLIAM BLAIKIE.

Sworn to before me this 6th day of March, 1899.

JOHN A. SHIELDS,
Examiner.

CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and 1260 Mary W. Achter vs. THOMAS G. RITCH individually and as Trustee and Executor of the Last Will and Testament of Daniel B. Fayerweather, deceased, and others.	In Equity.

United States of America, Southern District of New York, } ss.:

I, John A. Shields, an examiner, duly appointed by the Circuit Court of the United States for the Southern Dis-

trict of New York, do hereby certify that the foregoing are the proofs for final hearing taken before me in the above-entitled cause on the part of the complainants under and pursuant to the 67th rule of the Supreme Court of the United States as amended.

I do further certify that I am not of counsel nor attorney for either of the parties, nor in anywise interested in the event of the said cause.

I further certify that Mr. Roger M. Sherman and William Blaikie appeared on the part of complainants, and Messrs. Root, Howard, Winthrop and Stimson appeared on the part of the defendants in the taking of said proofs.

JOHN A. SHIELDS,

Examiner.

"Exhibit 5". Proceedings on Motion to Amend the Remittitur in the Court of Appeals.

1261

STATE OF NEW YORK,
COURT OF APPEALS,
Clerk's Office.

I, W. H. Shankland, Clerk of the Court of Appeals of the State of New York, do hereby CERTIFY that I have compared the annexed copies of papers submitted on a motion to Amend the Remittitur in the case of The Trustees of Amherst College and others, Respondents, against Thomas G. Ritch and others individually, and as Executors, &c., and others, Appellants, and a certified copy of the order entered on the decision of said motion, with the original on file in this Office, and that the same is a correct transcript therefrom, and of the whole of said original.

1262

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my official seal, at the City of Albany, this thirty-first day of October, A. D. 1898.

W. H. SHANKLAND,
Clerk.

Interlocutory Decree, Sustaining Plea of Hamilton College to Cross Bill.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms in the Borough of Manhattan, City of New York, on the day of July, 1900.

Present—Hon. E. HENRY LACOMBE, Circuit Judge.

JOHN B. REYNOLDS, as Executor, &c.,
1263 Complainant,

against

THOMAS G. RITCH, JUSTUS L. BULKLEY, and HENRY B. VAUGHAN, individually, &c., and THE TRUSTEES OF HAMILTON COLLEGE and others,
Defendants.

This cause came on to be heard upon the plea of the defendant the Trustees of Hamilton College to the Cross Bill of the Cross Complainant, John B. Reynolds, as executor, &c., herein at this Term, and was argued by counsel; and thereupon, upon consideration thereof, and on motion of Root, Howard, Winthrop, and Stimson, solicitors for said defendant, it was

ORDERED, adjudged, and decreed that the plea of the defendant, the Trustees of Hamilton College to the Cross Bill of the Cross Complainant John B. Reynolds, as executor, &c., be and the same hereby is allowed, and that the Complainants have leave to reply thereto at the September Rule Day, 1900, in default of which reply a decree be entered accordingly.

1264 E. HENRY LACOMBE,
U. S. Circuit Judge.

[Endorsed.]—U. S. Circuit Court, Southern Dist. of New York.—Filed Aug. 4, 1900.—John A. Shields, Clerk.

At a Stated Term of the U. S. Circuit Court for the Southern District of New York, held at the Federal Building in the Borough of Manhattan and County of New York, upon the 17th day of April, 1902.

Present—Hon. E. HENRY LACOMBE, Circuit Judge.

EMMA S. FAYERWEATHER, and another, Complainants, *against* THOMAS G. RITCH, &c., and others, Defendants.	In Equity. No. 6675.
1265	
JOHN B. REYNOLDS, as Sole Executor of the Estate of Lucy Fayerweather, deceased, Complainant, *against* THOMAS G. RITCH, &c., and others, Defendants.	In Equity. No. 6675.
1266	

Three motions having come on to be heard at a stated term of this Court on the 11th day of April, 1902, viz:

First.—A motion on behalf of the cross complainant, John B. Reynolds, as Executor, &c., to strike from the files of this Court the demurrer filed by the defendant the University of Rochester to the cross-bill of the said John B. Reynolds, as Executor, &c., on or about March 24th, 1902, the notice of which motion is dated April 4th, 1902, and which motion is made upon the affidavit of William Blaikie, verified on the same day.

Second.—A motion on behalf of the defendant, the University of Rochester, for leave to enter an appearance in the office of the Clerk of this Court in the above-entitled cross action brought by John B. Reynolds as Executor, &c., and for leave to file an answer, demurrer or plea to the cross-bill of the complainant John B. Reynolds, as Executor, &c., or that the demurrer filed on behalf of said University of Rochester to said cross-bill in the office of such Clerk on March 24th, 1902, be allowed to remain on file as the demurrer of such defendant, the notice of which motion is dated April 7th, 1902, and which motion is made upon the affidavits of Robert S. MacArthur, Seth Sprague Terry and Alexander S. Fisher.

1267 *Third.*—A motion on behalf of the defendant the University of Rochester, to vacate the judgment *pro confesso* entered herein on April 7th, 1902, against the defendant the University of Rochester, upon the cross bill filed by John B. Reynolds, as Executor, &c., the notice of which motion is dated April 8th, 1902, and which motion is made upon the same affidavits as the last above recited motion.

Now, after reading and filing the said notices of motion and said affidavits and the affidavits of William Blaikie verified April 11th, 1902, and after hearing William Blaikie, Esq., counsel for the said John B. Reynolds, as sole executor, &c., on behalf of the first of said motions and in opposition to the other two said motions, and

1268 Seth Sprague Terry, Esq., counsel for the defendant the University of Rochester, in opposition to the first motion and in favor of the other two motions.

IT IS ORDERED, that the defendant the University of Rochester be allowed to enter its appearance herein in the office of the Clerk of this Court upon the cross-bill filed by the cross complainant, John B. Reynolds, as executor, &c.; that the demurrer filed in the office of the Clerk of this Court on March 24th, 1902, on behalf of the University of Rochester to the cross-bill of the complainant,

John B. Reynolds, as Executor, &c., be allowed to remain on file as the demurrer of the said University of Rochester to said cross bill ; that the judgment entered *pro confesso* on April 7th, 1902, against the University of Rochester in favor of the cross complainant, John B. Reynolds, upon the cross-bill be and the same is hereby vacated, and

IT IS FURTHER ORDERED that the issues of law upon said demurrer be brought to a hearing and trial at the same time as the issues to the said cross-bill raised by the plea of the defendant the Trustees of Hamilton College, and in the event that said demurrer shall be overruled then the defendant the University of Rochester shall be
1269 deemed to have filed in the office of the Clerk of this Court a plea and answer in support thereof similar to the plea and answer in support thereof filed by the defendant, the Trustees of Hamilton College, to the said cross-bill herein of John B. Reynolds, as Executor, &c., and that the evidence taken herein prior to such hearing so far as it affects the defendant, the Trustees of Hamilton College, shall be deemed to have been taken under the said plea of the defendant the University of Rochester, reserving to the said University of Rochester all rights reserved to the defendant, the Trustees of Hamilton College.

1270 E. H. LACOMBE,
U. S. Circuit Judge.

Stenographer's minutes on motion as to pleadings and record.

FAYERWEATHER *v.* RITCH.
REYNOLDS *v.* RITCH.

BEFORE LACOMBE, *J.* MOTION.

NEW YORK, May 16, 1902.

Present—Mr. BOVEE, Mr. CARNOCHAN, Mr. BLAIKIE, Mr. MINRATH, Mr. KIDDLE, Mr. GOODALE, Mr. UPSON, Mr. FAIN, Mr. NASH,
1271 Mr. BISHOP and Mr. STIMSON.

The Court: I can state to everybody now present that presumably the day that I will fix for the hearing of this case will be in the week beginning the 9th of June; I cannot now tell the day exactly but presumably that will be the week.

Mr. Bovee: This matter is brought to your Honor's attention to-day in order to clarify the record so that the printing may be completed. There are two objects to be accomplished. One is to secure if possible uniformity of record on the part of the defendants. There are three or four answers. I will take the case of Columbia College as an instance. Columbia has filed a plea to the main bill and an answer to the cross-bill.

1272 The Court: Now what about the bulk of the others?
Mr. Bovee: They have filed pleas.

The Court: And pleas to the cross-bills instead of answers?

Mr. Bovee: Yes, sir. Now it certaintly is desirable, and the attorneys who have filed answers, I think, stand here to-day desirous to have your Honor make an order similar to the order which was made in the case of Lafayette, that there be deemed filed a plea similar to the plea filed by Hamilton, or similar to the plea filed by the executors, and that there be deemed a replication to that in the usual form filed, and then if that is done as to the four defendants who have filed answers, that they should manifest now their election to adopt either the proofs taking in

the Hamilton College record or that of the defendants Bulkley, Ritch and Vaughan. There are two records, as your Honor will recall; one made by Hamilton, and the other made by the executors, and it is immaterial, we think, which one they adopt. They can do whatever they please. And I desire to have your Honor, if possible, say that we may now indicate to the stenographer, counsel all being present, that they now elect to adopt either the proofs of Hamilton or the proofs of the executors, and that they stand upon that election made at this time. And I think your Honor should say that in view of the proceedings, an order should be entered upon their election.

1273 Now, there are one or two particular things to which I wish to call your Honor's attention in respect to these answers. The Mt. Sinai Hospital is in rather a peculiar position. They first filed an answer to both the main bill and the cross-bill. They have a stipulation signed by the counsel for the complainants, permitting them to withdraw the answer to the bill, and substitute a plea. I understand from Mr. Minrath, of Hoadley, Lauterbach & Johnson, that there was an understanding between him and Mr. Blaikie, counsel for the cross-complainant, that he also permit Mt. Sinai to file a similar plea; but that has never been carried out, and he has not been able to make a record in that respect. It seems to me that that should be permitted.

1274 Now, in the case of Northwestern University; the filed a plea to the bill, and an answer to the cross-bill iny that case.

Mr. Kiddle: An answer to both.

Mr. Bovee: An answer to both?

Mr. Kiddle: Yes.

Mr. Bovee: Well, an answer to both. Now the Northwestern University is anxious to come in and adopt the proofs taken by the executors and stand on the same footing with them. That would make the record so that there would be no conflict in respect to the testimony and proofs. I may say that the testimony which has been taken has been taken between the complainants and the executors; they have been practically the only parties to the testimony which had been taken, other than that of

Hamilton, and there seems to me to be no good reason why we should not establish uniformity of record at this time. If your Honor has determined that, that brings us to the question of the pleadings. Then I will indicate to your Honor and take up in order the parties who will adopt the proofs.

The Court: Mr. Blaikie, what have you to say?

Mr. Blaikie: Your Honor, you have already decided, I think——

The Court: The question is whether now there is not more to be gained by getting everything all in.

Mr. Blaikie: I understand the purpose of the motion is to close the pleadings and close the proofs; and we
1275 only wish to have the proofs that have been taken in support of the complainants preserved, so that we may have the full use of them, and not have the reasons which justified our taking some of them withdrawn, and the foundation taken out from under those proofs, and then have it held: Oh, you have no right to have those proofs now, because the answers are gone.

The Court: The situation in that regard would be only as to four out of all of them.

Mr. Blaikie: I am aware of that, but I would not like to lose whatever advantage there may be from that. If we had known when they should have let us know, it would be a very different looking record, and of course we do not want to lose any part of the testimony we have
1276 taken, sir——

The Court: What I am figuring on is this; this very record that you have made, you made taking testimony with adversaries who have not filed an answer.

Mr. Blaikie: Yes, and in part with those who have.

The Court: If it is good enough for them, why is it not good enough for the others?

Mr. Blaikie: This testimony went to the truth of the pleas largely, although I think some parts of it did not. It is a large record, and it would require an effort to recall all parts of it. At the same time I wish not only to preserve the testimony that we have taken, but to have the right—one of the gentlemen at least wants to take some

more testimony—to meet any further testimony that is taken by further testimony on our side. Your announcement just now as to when we would take up the hearing would not give us time to do that. Other than that I do not see much in the motion to object to. I only want to preserve our rights.

The Court: Let us take it step by step, as Mr. Bovee has suggested. You are going to take them up individually?

Mr. Bovee: Yes. First, Mr. Nash, Columbia College.

Mr. Nash: I have filed a plea to the bill and an amendment here; I have taken a stipulation; I have filed only an answer to the cross-bill, and the solicitors for the
1277 complainants agree. I believe that the testimony taken by the executors should apply to the issue thus raised. The application now suggests that I should have leave to with draw that answer, and file a plea and supporting answer, and that was what I tried to do with the solicitors for the complainants more than a year ago, and I prepared my papers, but when it came to the formal action, one thing after another led to delay, and they finally declined to give me the stipulation, and I appealed to your Honor and the motion was denied. It is exactly the relief that I wanted and I should be very glad to take up Mr. Bovee's suggestion as to the applicability of the testimony taken either by Hamilton or the executors.

Mr. Bovee: Does your Honor permit Columbia to
1278 withdraw its answer and file a plea to the cross-bill?

The Court: Yes.

Mr. Blaikie: And the testimony taken by both sides be allowed to be used under it?

Mr. Nash: Yes, taken by both sides in each case.

Mr. Blaikie: Why both sides as to Columbia?

Mr. Bovee: No, the matter of proofs is another matter; let us dispose of the pleadings first.

The Court: We have disposed of the pleadings. I thought I was going to dispose of Columbia altogether first. Now which does he choose, what proofs?

Mr. Bovee: I thought you would take up the question of proofs immediately afterwards and dispose of it as to each of the colleges.

The Court: Some may have a choice as to one or the other.

Mr. Nash: Under the original bill and amended bill my stipulation is that the testimony as taken by Hamilton College shall be used; under the cross-bill and answer my stipulation is that the testimony as taken by the executors shall be used. I am perfectly willing to defer to Mr. Blaikie's wishes in the matter and take whichever he says.

Mr. Blaikie: I prefer the latter.

Mr. Bovee: As to Mt. Sinai will you direct the entry of a similar order?

The Court: Yes.

1279 Mr. Bovee: Which plea will you elect to take, Hamilton's or the executors'?

Mr. Minrath: Executors.

Mr. Bovee: Whose proofs do you adopt?

Mr. Minrath: Executors'.

Mr. Bovee: In the case of Northwestern University your Honor directs the same order?

The Court: Yes.

Mr. Blaikie: Same provision as to replication?

The Court: Yes.

Mr. Kiddle: I understand that that understanding is embodied in the stipulation that Mr. Blaikie gave to Mt. Sinai, that if the plea should be denied, that the defendants have the right to answer over; I think it comes

1280 however within your Honor's original contemplation that the first plea should be regarded as a dilatory plea.

Mr. Blaikie: That will delay the hearing.

The Court: I think you had better go the way everybody else has been going.

Mr. Kiddle: Then I will withdraw the answer, and file the plea of Hamilton and accept the proofs of Hamilton College.

Mr. Bovee: Now, Mr. Bishop, Union Theological Seminary.

Mr. Bishop: We filed a plea to the original bill to conform to the Hamilton College plea and we filed an answer to the cross-bill. I am willing that the answer should be withdrawn and a plea in the form of the Hamilton College plea be substituted for the purpose of speeding the trial,

and that the proofs taken in the Hamilton College record shall stand in the Union Theological Seminary case.

The Court: Very good.

Mr. Blaikie: A replication has been filed to the cross-bill, and will serve for the plea. We have our replication which will protect our testimony.

Mr. Bovee: The Woman's Hospital has filed a plea to the bill and an answer to the cross-bill. We ask that the same disposition be made of that.

The Court: Same disposition; the answer may be withdrawn and the plea deemed to be filed, and the replication filed thereto. Which plea do you take, the plea of
1261 Hamilton College or the plea of the executors?

Mr. Bovee: The executors' plea, and they adopt the executors' proofs in both cases.

Dartmouth has no pleading, I believe, as to the cross-bill. They claim to have a stipulation. And I ask for the entry of an order that they be deemed to have filed a plea similar to the executors' plea to the cross-bill. They have filed a plea to the bill, and the same as to that.

The Court: Yes.

Mr. Blaikie: And the replication be deemed filed?

Mr. Bovee: Yes.

Mr. Blaikie: How about testimony?

Mr. Bovee: Executors' proofs. Now, Mr. Stimson,
1282 are you ready to say about the cross-bill and what proofs do you stand on?

Mr. Stimson: I am not asking for any favors and therefore I stand in a little different position from the others. Your Honor entered an order about a year ago, about the 1st of February, 1901, in which you then gave Hamilton College the right to stand on the record which had already been submitted as to the original bill. You gave Hamilton College the right to stand on those same records as to the cross-bill if it should so choose. You also gave it the right under this same order to elect within ten days after the proofs of the executors' had been closed whether or not it would also stand on the proofs of the executors. I understand those proofs are not yet closed, and so under this order I should technically still have time to elect; but I am ready to elect now, if it should suit the convenience

of parties, sooner; and I should elect to stand on our original proofs and not upon the proofs of the executors. I should wish to state, your Honor, that at the same time that we do this I must also have it placed upon the record that we renew the objections which we have several times made in the course of this litigation, that we do not waive, in making this election and adopting those proofs, our previous objections that the cross-bill is not germane to the original bill; or, second, the objection to this Court's jurisdiction to entertain the cross-bill on the ground that it has no probate jurisdiction or otherwise; or, thirdly, our objections which we took at the opening of the taking of the proofs, that the fact that there had been a

1283 decree entered dismissing the original bill necessarily caused the cross-bill to fall. I should like the record to show that none of those objections are waived.

Mr. Blaikie: I take it that those will be passed upon on the final hearing.

Mr. Stimson: I will renew them on the final hearing.

Mr. Bishop: I understand that the record made for Hamilton College, including all these exceptions, and that the position in every particular that Hamilton College occupies, is also the position taken by Amherst, Williams and the Union Theological Seminary, which stand on that record.

The Court: Yes, everything will stand on the same four corners as far as possible.

1284 Mr. Bovee: As to Amherst College, what proofs do you adopt, Hamilton's?

Mr. Bishop: We will stand on the record of Hamilton College precisely. There have been no proofs taken on the cross-bill so far. You know our plea was not filed until a very few days ago. But we will stand on the record made by Hamilton College.

Mr. Bovee: As to Bowdoin College, represented by Butler, Notman, Joline & Mynderse, it adopts the proofs of the executors.

What about Columbia College?

Mr. Nash: As I understand there is a difference between the plea and supporting bill filed by the executors

and the Hamilton College. I want it understood that I accept the one filed by the executors.

Mr. Bovee: Cornell, Marietta, Yale, Wesleyan and the Manhattan Eye and Ear Infirmary adopt the proofs of the executors as to the bill and cross-bill. Dartmouth adopts the proofs of the executors as to the bill and cross-bill. Lafayette is covered by a stipulation.

Now Mt. Sinai?

Mr. Minrath: The executors' proofs in both cases.

Mr. Bovee: Northwestern?

Mr. Kiddle: We adopt Hamilton's proofs on the understanding that the statement made by Mr. Stimson to-day is part of the record.

1285 Mr. Bovee: The Presbyterian Hospital adopts the proofs of the executors.

Now as to Rochester University, Mr. Bishop?

Mr. Bishop: We have a demurrer there and a stipulation, and we stand on the Hamilton College plea. Rochester has filed a plea in the form of the Hamilton College plea to the original bill; it demurs to the cross-bill, with a stipulation that if the demurrer to the cross-bill is overruled then it adopts the plea and the proofs of Hamilton College.

Mr. Bovee: St. Luke's Hospital adopts the proofs of the executors.

The Union Theological Seminary, Mr. Bishop?

Mr. Bishop: That is disposed of.

1286 Mr. Bovee: Williams College?

Mr. Bishop: That is disposed of.

Mr. Bovee: By stipulation?

Mr. Bishop: No, in the same way: I have already stated our position.

Mr. Bovee: The Woman's Hospital adopts the proofs of the executors. I think that covers the record.

Mr. Upson: Adelbert College is covered by an order entered by the Court in October, 1900, by which Adelbert College is deemed to have filed a plea identical with that of Hamilton College to both the original bill and the cross-bill, and we have adopted the record of Hamilton College, and Adelbert College had at that time, and has ever since until now had the option to adopt also the additional

proofs taken by the executors. I have not had an opportunity yet to read those additional proofs, and in fact they have not yet quite closed. At the close of the executors' proofs I would like an opportunity to formally adopt or not their additional proofs.

The Court: It would take you many days to read both sets of proofs I should think.

Mr. Blaikie: Not so long, your Honor.

Mr. Bovee: Yes, it will take a long time. I ask your Honor to extend the time for the taking of defendants' proofs until, say next Wednesday, Mr. Reynolds being a witness on the stand. I do not know that there is any more.

1287 Mr. Blaikie: Also the complainant's.

Mr. Bovee: No, complainants have rested.

Mr. Blaikie: We have a right to have an opportunity to rebut.

Mr. Bovee: Your Honor extended the time until the determination of this motion, and I ask your Honor to extend it until next Wednesday.

The Court: Yes.

Mr. Blaikie: I want to say this, that the order to show cause you granted which was returnable to-day, Mr. Sherman came here fully expecting to argue this; and I was not notified that I had to argue it, nor was I prepared to; and it being his last day to prepare a very important appeal, he had to leave, and I want to ask, sir, that before

1288 your Honor makes an order here, he be allowed to read the stenographer's minutes, and make any suggestions he desires. I have had to work in the dark, being wholly unprepared.

The Court: Will you do it to-morrow?

Mr. Blaikie: You are not going to sign it until Wednesday.

Mr. Bovee: We will give notice of settlement of the orders to the other side on these propositions mentioned to-day.